89-1698

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

**SCHOOL DISTRICT NO. 1,
DENVER, COLORADO, et al.,**

Petitioners,

v.

WILFRED KEYES, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a school district that fully implemented a comprehensive remedial plan that resulted in a racially neutral, fully desegregated student attendance pattern, and maintained full compliance with that plan and all court orders relating to it for over a decade, was entitled to be released from continuing judicial control over student assignments.

2. Whether a district court, having decided that a remedial student assignment plan need no longer be adhered to by the school district, after more than ten years of full compliance with the plan, and having dissolved the injunction requiring such plan, may nevertheless subject the school district to continuing judicial control in the form of an injunction that requires the district to maintain racial balance in all schools of the district for an indeterminate period of time (and perhaps permanently).

3. Whether a school district may validly be subjected to an injunction forbidding it to operate any school that becomes "racially identifiable," where no standard for measuring "racial identifiability" is provided and where the districtwide *average* of the minority school population has already reached more than 60 percent.

4. Whether a school district may validly be subjected to an injunction that contains *any* requirement of racial balance that is applicable to every school in the district and, if not, whether any form of continuing injunction to maintain racial balance is permissible, consistent with the Constitution and with the specificity requirements of Rule 65 of the Federal Rules of Civil Procedure.

PARTIES

The following parties are now or have been interested in this litigation or any related proceedings:

Plaintiffs:

WILFRED KEYES, individually and on behalf of CHRISTI KEYES, a minor; CHRISTINE A. COLLEY, individually and on behalf of KRIS M. COLLEY and MARK A. WILLIAMS, minors; IRMA J. JENNINGS, individually and on behalf of RHONDA O. JENNINGS, a minor; ROBERTA R. WADE, individually and on behalf of GREGORY L. WADE, a minor; EDWARD J. STARKS, JR., individually and on behalf of DENISE MICHELLE STARKS, a minor; JOSEPHINE PEREZ, individually and on behalf of CARLOS A. PEREZ, SHEILA R. PEREZ and TERRY J. PEREZ, minors; MAXINE N. BECKER, individually and on behalf of DINAH L. BECKER, a minor; and EUGENE R. WEINER, individually and on behalf of SARAH S. WEINER, a minor.

Plaintiff Intervenors:

MONTBELLO CITIZENS' COMMITTEE, INC., CONGRESS OF HISPANIC EDUCATORS, an unincorporated association; ARTURO ESCOBEDO and JOANNE ESCOBEDO, individually and on behalf of LINDA ESCOBEDO and MARK ESCOBEDO, minors; EDDIE R. CORDOVA, individually and on behalf of RENEE CORDOVA and BARBARA CORDOVA, minors; ROBERT PENA, individually and on behalf of THERESA K. PENA and CRAIG R. PENA, minors; ROBERT L. HERNANDEZ and MARGARET M. HERNANDEZ, individually and on behalf of RANDY R. HERNANDEZ, ROGER L. HERNANDEZ, RUSSELL C. HERNANDEZ, RACHELLE J. HERNANDEZ, minors; FRANK MADRID, individually and on behalf of JEANNE S. MADRID, a minor; RONALD E. MONTOYA and NAOMI R. MONTOYA, individually and on behalf of RONALD C. MONTOYA, a minor; JOHN E. DOMINGUEZ and ESTHER E. DOMINGUEZ, individually and on behalf of JOHN E. DOMINGUEZ, MARK E. DOMINGUEZ and MICHAEL J.

DOMINGUEZ, minors; and JOHN H. FLORES and ANNA FLORES, individually and on behalf of THERESA FLORES, JONI A. FLORES and LUIS E. FLORES, minors; MOORE SCHOOL COMMUNITY ASSOCIATION and MOORE SCHOOL LAY ADVISORY COMMITTEE, CITIZENS ASSOCIATION FOR NEIGHBORHOOD SCHOOLS, an unincorporated association, and on behalf of all others similarly situated.

Additional Intervenors:

SUSAN TARRANT, WADE POTTER, DEBORAH POTTER, DANIEL J. PATCH, MARILYN Y. PATCH, CHRIS ANDRES, RONALD GREIGO, DORA GREIGO and RANDY FRENCH.

Defendants:

SCHOOL DISTRICT NO. 1, DENVER, COLORADO; THE BOARD OF EDUCATION, SCHOOL DISTRICT NO. 1, DENVER, COLORADO; WILLIAM C. BERGE, individually and as President, Board of Education, School District No. 1, Denver, Colorado; STEPHEN J. KNIGHT, JR., individually and as Vice President, Board of Education, School District No. 1, Denver, Colorado; JAMES C. PERRILL, FRANK K. SOUTHWORTH, JOHN H. AMESSE, JAMES D. VOORHEES, JR., and RACHEL B. NOEL, individually and as members, Board of Education, School District No. 1, Denver, Colorado; ROBERT D. GILBERTS, individually and as Superintendent of Schools, School District No. 1, Denver, Colorado; and their successors, EDWARD J. GARNER, as President, Board of Education, School District No. 1, Denver, Colorado; DOROTHY GOTLIEB, as Vice President, Board of Education, School District No. 1, Denver, Colorado; NAOMI L. BRADFORD, SHARON BAILEY, MARCIA JOHNSON, TOM MAURO and CAROLE H. McCOTTER, as members, Board of Education, School District No. 1, Denver, Colorado; and RICHARD P. KOEPPE, Ph.D., as Superintendent of Schools, School District No. 1, Denver, Colorado.

Defendant Intervenors:

MR. AND MRS. DOUGLAS BARNETT, individually and on behalf of JADE BARNETT, a minor; MR. AND MRS. JACK PIERCE, individually and on behalf of REBECCA PIERCE and CYNTHIA PIERCE, minors; MRS. JANE WALDEN, individually and on behalf of JAMES CRAIG WALDEN, a minor; MR. AND MRS. WILLIAM B. BRICE, individually and on behalf of KRISTIE BRICE, a minor; MR. AND MRS. CARL ANDERSON, individually and on behalf of GREGORY ANDERSON, CINDY ANDERSON, JEFFERY ANDERSON and TAMMY ANDERSON, minors; MR. AND MRS. CHARLES SIMPSON, individually and on behalf of DOUGLAS SIMPSON, a minor; MR. AND MRS. PATRICK McCARTHY, individually and on behalf of CASSANDRA McCARTHY, a minor; MR. RICHARD KLEIN, individually and on behalf of JANET KLEIN, a minor; and MR. AND MRS. FRANK RUPERT, individually and on behalf of MICHAEL RUPERT and SCOTT RUPERT, minors.

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OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at 895 F.2d 659. The June 3, 1985 opinion and order of the district court (Appendix B) is reported at 609 F. Supp. 1491. The October 29, 1985 order of the district court is reproduced in Appendix C. The February 25, 1987 opinion and order of the district court (Appendix D) is reported at 653 F. Supp. 1536. The October 6, 1987 opinion and order of the district court (Appendix E) is reported at 670 F. Supp. 1513.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1990. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[No State shall] deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This case is a sequel to this Court's decision in *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973), which ruled that a finding of discrimination in one geographic part of the Denver school system gave rise to a presumption of districtwide discrimination.[1]

On remand from this Court a districtwide desegregation plan was ordered which, as modified by a subsequent decision of the court of appeals, was fully implemented in the 1976 school year. In that year, as the district court found in the present proceedings, "the Denver school system [could] be considered desegregated with respect to pupil assignments." App. B35. As a result of the student assignment plan ordered by the court, in that school year only one of the 119 schools in the Denver school system varied by more than a *de minimis* amount from the

[1] Citations to all the reported decisions in the history of the case are provided in note 1 of the opinion below. *See* App. A3. The jurisdiction of the district court is based on 28 U.S.C. §§ 1331 and 1343.

court's targeted range of ± 15% of the districtwide Anglo/minority percentage.

The student assignment plan implemented pursuant to the 1976 decree (sometimes referred to as "the Finger Plan") has remained the basic framework for the school system ever since. The Finger Plan involved extensive re-drawing of school boundaries, pairing of many elementary schools and use of satellite zones, with busing of a large fraction of the pupil population.[2] The only changes in the plan have been adjustments made pursuant to court order in 1979 and 1982. The 1982 adjustments eliminated a number of the previous pairings and created more neighborhood schools as well as two magnet schools. A number of elementary schools were closed pursuant to each of the 1979 and 1982 orders.

In 1984 the school district moved that the system be declared unitary and that the jurisdiction of the district court be terminated. In the alternative, it moved that the 1976 decree be modified by dissolving the provisions prescribing student assignments.

The plaintiffs opposed the motion and countered by moving for extensive further relief, including revisions in the

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[2] In addition to those student-assignment provisions, the decree dealt comprehensively with facilities, faculty, transportation, extracurricular activities, and other aspects of the district's operations. It also prescribed a bilingual education program. The bilingual provisions were eliminated by the court of appeals as not supported by any finding of constitutional violation. 521 F.2d 465, 482-83. Later, on the complaint of an intervening class of limited English proficiency children, the bilingual program of the district was held inadequate under 20 U.S.C. § 703(f). 576 F. Supp. 1503 (1983). That ruling resulted in a consent decree, referred to as the Language Rights Consent Decree of August 17, 1984. *See* Interim Decree ¶ 10, App. E8.

attendance plan for the purpose of correcting racial/ethnic imbalances that had developed over the preceding years and particularly since the 1982 revisions. App. C1-C2.

After a hearing, the court in 1985 denied the school district's motion and ordered the Board of Education to submit plans for remedying certain deficiencies found by the court, including plans for rectifying the "resegregation" at three elementary schools whose Anglo percentage had fallen to 18%, 15%, and 12% respectively.[3] App. B32, C3. While maintaining its position that further remedial orders were not appropriate, the school district advised the court of measures it had adopted that were intended to encourage increased Anglo attendance at the three schools on a voluntary basis, and it stated its opposition to any mandatory reassignments. (The measures proposed included certain experimental curricular themes at two of the schools and the installation of a Montessori magnet program at the third.) The plaintiffs renewed their request for mandatory reassignments, including new pairings, to improve racial balance at the schools in question.[4]

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[3] The total enrollment and the racial/ethnic composition of the Denver public schools have changed materially over the years that the Finger Plan has been in effect, as shown by the following table:

	Total enrollment	*Anglo enrollment*	*% Anglo*
1973-74	87,620	49,394	56%
1976-77	61,680	30,427	49%
1983-84	51,159	20,043	39%

See 380 F.Supp. 673, 674; App. B33.

[4] The other deficiencies found by the district court in its 1985 order related to distribution of teachers and administration of student hardship transfers. In response to the court's order for plans to address the deficiencies, the Board advised the court that it

(Footnote continued on following page)

After a second hearing, which took place two years after the first hearing on the school district's motion, the district court determined that no further remedial orders were required. It authorized the Board to implement the proposals the Board had put forward and it denied the plaintiffs' motion for further relief. The court further determined (in contrast to its 1985 decision refusing to lift or modify the injunction) that the time had come to "relax" judicial supervision over the school district, and to give the Board greater independence in managing its affairs while at the same time retaining judicial control until such time as the court was prepared to declare the district unitary and enter a permanent injunction. App. D9-D13.

The district court then implemented that decision by entering an "Interim Decree." That decree (1) dissolved the original remedial decree, expressly relieving the Board of any duty to maintain the attendance plan initially ordered by the court as the remedy for past constitutional violations, but (2) placed the Board under a continuing obligation to maintain some unstated degree of racial balance. Specifically, the Interim Decree provided that:

> 1. * * * * [The defendants] shall continue to take action necessary to disestablish all school segregation, eliminate the effects of the former dual system and prevent resegregation.
>
> 2. The defendants are enjoined from operating schools or programs which are racially identifiable as

[4] *continued*
had adopted resolutions on both matters that imposed more stringent administrative requirements. App. D3-D4. Although the Board contended that the district court was improperly imposing new requirements that went beyond the original decree, neither of these matters was contested by the Board on the appeal to the Tenth Circuit.

a result of their actions. The Board is not required to maintain the current student assignment plan of attendance zones, pairings, magnet schools or programs, satellite zones and grade-level structure. Before making any changes, the Board must consider specific data showing the effect of such changes on the projected racial/ethnic composition of the student enrollment in any school affected by the proposed change. The Board must act to assure that such changes will not serve to reestablish a dual school system.

3. The constraints in paragraph 2 are applicable to future school construction and abandonment.

* * * *

7. The defendants shall maintain programs and policies designed to identify and remedy the effects of past racial segregation.

* * * *

12. This interim decree, except as provided herein, shall supersede all prior injunctive orders and shall control these proceedings until the entry of a final permanent injunction.

App. E5-E8.

No time limit was set for the duration of the Interim Decree nor did the court specify what steps the district must take or what conditions it must meet in order to be declared unitary and be released from the court's supervisory jurisdiction.[5] The court indicated, however,

[5] The court said:

The timing of a final order terminating the court's supervisory jurisdiction will be directly related to the defendants' performance under this interim decree. It will be the defendants' duty to demonstrate that students have not and will not be denied the opportunity to attend schools of like quality, facilities, and

(Footnote continued on following page)

that even "when unitary status is achieved" the court's supervision would not be lifted until the court was "reasonably certain that future actions will be free from institutional discriminatory intent." The court did not define "institutional discriminatory intent" but made clear that it meant something other than "discriminatory intent" of the board and its members: "[I]t is not, however, measured by the good faith and well meaning of individual Board members or of the persons who carry out the policies and programs directed by the Board." App. E5. (The court had already indicated, however, that it considered the Board's declared policy for the future inadequate because it did not promise to avoid "discriminatory impact" as distinguished from "discriminatory intent." *See* App. B57.)

Two years prior to entry of the Interim Decree, the school district had appealed the court's order of June 3, 1985 refusing the 1984 motion for a finding of unitariness or for dissolution of the student-assignment provisions. Although that interlocutory appeal had been properly taken under 28 U.S.C. § 1292(a)(1) from an order refusing to modify an injunction, the court of appeals had postponed consideration of the merits of the appeal until further action in the district court.

That further action did not come until 1987. The district then appealed the order entering the Interim Decree. The court of appeals consolidated the two appeals for hearing, heard them on January 17, 1989 and decided both

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[5] *continued*

staffs because of their race, color or ethnicity. When that has been done, the remedial stage of this case will be concluded and a final decree will be entered to give guidance for the future.

App. E4.

appeals on January 30, 1990. Thus five additional years of full compliance with the comprehensive student assignment plan originally ordered in 1976 have taken place since the hearing on the school district's initial motion for a declaration of unitariness or termination of court supervision over student assignments.[6]

The court of appeals affirmed both (1) the district court's 1985 refusal to declare the district unitary or to grant relief from the court's control over student assignments and (2) the district court's 1987 order dissolving the 1976 decree and replacing it with the Interim Decree, except that the court ordered minor modifications in the Interim Decree.

As to the 1985 order, the court ruled that the district court had been in error in concluding that a school district could not be found unitary as to student assignments separately from an overall finding of unitariness. But the court held that that error was immaterial since the school district, according to the court of appeals, had not challenged the district court's conclusion of "fact" that the "resegregation" of three elementary schools was not caused

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[6] There has never been any question that the school district was in full compliance with the student assignment plan ordered in 1976 as modified by orders of the court in 1979 and 1982. The "resegregative" effects relied on by the district court in its 1985 order were simply effects attributed by the court to certain modifications *permitted by the court* after hearing in 1982. There have been no "resegregative actions" by the school district unless actions taken with court approval can be so described. Since the school district has at all times been in full compliance with the court-ordered student assignment plan, the case is an even stronger case for unitary status than existed in *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239 (9th Cir. 1979) and *Morgan v. Nucci*, 831 F.2d 313 (1st Dist. 1987), discussed *infra*.

by demographic changes. App. A14.[7] That "finding" was enough, the court thought, to support a conclusion that the district was not unitary. In reaching that conclusion the court of appeals entirely ignored the fact that the district court had found that as of 1976 the Denver school district had been fully desegregated as to student assignments, as well as the fact that there had never been a failure to comply strictly with the court-ordered student assignment plan (and the district court had found none). App. B35.

The court of appeals also found that the district court's refusal to declare the district unitary even as to student assignments was supported by the district court's "belief" that the district was "without the ability and without the will to ensure that the effects of prior segregation [do] not resurface." App. A16.

In affirming the 1985 order, the court of appeals took no note of the fact that the district court's 1987 action had undermined the district court's own 1985 refusal to

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[7] The court of appeals' observation on this point was a misreading of the record and of the school district's position. There was never any issue in the district court as to whether the three schools had become racially imbalanced as a result of "demographic" change, although the district court's opinion created an impression that such a contention had been made. The obvious fact, which was not in dispute, was that Anglo pupils had failed to appear in the expected numbers after the changes in assignments made by the court-approved modifications in 1982. The school district's primary contention was that the court had no power, in view of this Court's decision in *Pasadena City Bd. of Educ. v. Spangler* 427 U.S. 424 (1976), to order continuing adjustments to correct for racial imbalance merely because it had "reserved jurisdiction" to do so each time it entered an order. The court of appeals did not discuss the school district's argument that the principle of *Spangler* could not properly be circumvented or frustrated by such a "bootstrap" theory.

find the district unitary or grant relief from the student assignment provisions. It failed or declined to recognize that the very fact of dissolution of the 1976 decree, and the express determination that the school district need no longer follow the Finger Plan, was the equivalent of a finding in 1987 that the district had become unitary at least as to student assignments. Instead, the court of appeals treated the "Interim Decree" as in substance a "continuation" of the original decree (App. A20), notwithstanding that the Interim Decree itself stated that it "supersede[d] all prior injunctive orders" (App. E8) and that the district court had referred to the superseded provisions as "obsolete." App. E4.

The court declined to modify the decree's provisions ordering the Board to "prevent resegregation" and forbidding the Board to operate any schools that are "racially identifiable." It merely cautioned that it is not necessary that each school must "necessarily reflect the racial proportions in the district as a whole."[8] App. A19-A21. The court approved the Interim Decree as a commendable effort to give the school district "more freedom," although it expressed sympathy with the district's "frustration with not knowing its precise obligations." App. A21.

Like the district court, the court of appeals provided no comfort as to when the "interim" decree might end or how the district might bring that about, saying only, "We recognize that the showings required to obtain unitariness are difficult to make. But when the district makes those showings is entirely within its own control." App. A22.

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[8] The court of appeals did strike paragraph 4 of the Interim Decree on the ground that it was no more than an injunction to obey the law. App. A18. *See* discussion *infra*, pp. 18-19.

REASONS FOR GRANTING THE WRIT

I. The Supervisory Injunction Upheld By The Court Of Appeals Is Contrary To The Remedial Limits Established By This Court's Decisions And Is In Conflict With The Decisions Of Other Circuits.

This case, like the Tenth Circuit's decision in the *Dowell* case, in which certiorari has been granted,[9] raises fundamental issues as to the obligations of a school board once the remedial process of desegregation has been carried to completion. In this case, as in its *Dowell* decision, the Tenth Circuit has adopted a view of the remedial process that is irreconcilable with principles previously recognized by this Court, and that is also in conflict with decisions in other circuits.

In *Dowell* the issues arise in the context of determining the effect to be given to an express determination that a school district has become "unitary" and determining what standard governs the dissolution of a remedial decree. In this case the issues arise because the district court, although declining to declare the school district unitary, found it appropriate to dissolve the remedial decree as it pertained to student assignments but then imposed a new decree that perpetuates indefinitely the obligation to maintain racial balance in each of the schools in the system.

In contrast to *Dowell*, no question has been raised in this case as to the propriety of the dissolution of the remedial student assignment plan under which the Denver district had operated for eleven years. Thus this case raises no question about the applicable standard for modi-

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[9] *Dowell v. Bd. of Educ. of Oklahoma City Public Schools*, 890 F.2d 1483 (10th Cir. 1989), *cert. granted*, 58 U.S.L.W. 3610 (U.S. Mar. 27, 1990) (No. 89-1080).

fying or dissolving a longstanding injunction; the law of the case is that the dissolution has properly taken place. The case therefore throws into even sharper relief than the *Dowell* case the question of the nature of a school district's continuing obligations once the original remedial order has been fully executed and a court has determined that it need no longer be followed.

Under the teachings of this Court in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and in *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976), the fact that the Denver school district had reached the point where the judicially-prescribed remedy was complete should have meant that the school district was entitled to be returned to full autonomy, at least over student assignments, and that the district court could not perpetuate its regulatory control merely by failing to pronounce the magic word "unitary." For "having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations," as the Court said in *Spangler*, "the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." 427 U.S. at 436-37.

In disregard of that principle, the district court proceeded to replace the original remedial decree with a new injunction whose terms require the school board to maintain some indeterminate degree of racial balance in the schools for an indefinite period (and with the apparent expectation on the part of the court that such an obligation will become permanent).[10]

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[10] The district court said:

> A permanent injunction is necessary for the protection of all those who may be adversely affected by Board action. The

(Footnote continued on following page)

The new decree enjoins the Denver school board to "prevent resegregation." App. E6, ¶1. It also declares that the duty "imposed by the law and by this interim decree" includes the "maintenance" of the desegregated condition of the Denver schools. App. E6, ¶4. The decree also requires the Board to consider the projected racial/ethnic composition of each school before making any changes in the student assignment plan, and it enjoins the Board from operating any school that is "racially identifiable." App. E6, ¶2.

Such an injunction is contrary to principles established by the decisions of this Court and of other circuits.

First, this Court made clear in both the *Swann* case and the *Spangler* case that once the affirmative duty to desegregate schools has been accomplished, a school district has no constitutional obligation to make continuing adjustments of student assignments in order to preserve racial balance, and in *Spangler* the Court ruled that a district court has no power to order a school district to do so. That ruling was made in *Spangler* even though the school district had not been declared unitary. (Although

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[10] *continued*

> Tenth Circuit Court of Appeals has recently emphasized and repeated the admonition that "the purpose of court-ordered school integration is not only to achieve, but also to *maintain* a unitary school system." [Citing *Dowell v. Bd. of Educ.*, 795 F.2d 1516, 1520 (1986; emphasis in quote).] *Resegregation can occur as much by benign neglect as by discriminatory intent.* A beneficiary of a permanent injunction may come to court to enforce the rights obtained in this litigation by showing that the injunctive decree is not being obeyed.

App. D12 (emphasis added).

Interestingly, the authority cited by the Tenth Circuit in the quoted passage was *this* district court's statement in its 1985 opinion in the present case. *See Dowell*, 795 F.2d at 1520.

the reference in *Swann* was to "year-by-year" adjustments, the *Spangler* decision made clear that the principle involved is that once a racially neutral attendance plan has been established, a school district has no further affirmative obligation to pursue racial balance in student enrollments in response to changing compositions of the schools. 427 U.S. at 436-37.)

Second, the Tenth Circuit's approval of the notion that a court may continue to exert some "looser degree of control" over student assignments, notwithstanding the fact that the purposes of a remedial plan have been fulfilled so that that plan has been dissolved, conflicts with the decisions of the First Circuit in *Morgan v. Nucci*, 831 F.2d 313 (1987) and the Ninth Circuit in *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239 (1979).

In *Morgan v. Nucci* the district court had attempted to preserve its power over student assignments in the same manner as did the district court in this case. It entered what it called final orders prescribing future conduct for the Boston school board, explaining that

> the final orders seek to provide assignment guidelines for future years which are as flexible as consistency with a workable student desegregation plan permits; and an irreducible minimum of safeguards for insuring a future in which the Boston public schools may flourish on a racially unitary, racially unidentifiable, yet flexible and clear foundation of equal access and equal educational opportunity for all students.

620 F. Supp. 214, 222 (D. Mass 1985).

The court of appeals for the First Circuit vacated the district court's order. With respect to the district court's effort to provide a modified injunction controlling future student assignments the court said, "The schools are

either unitary or not in respect to student assignments." *Morgan v. Nucci*, 831 F.2d at 326. The court held that unless new or different facts should appear on remand, the school district should be found unitary as to student assignments and the injunction as to student assignments should be permanently vacated. *Id.*

Similarly, in *Spangler v. Pasadena City Bd. of Educ.*, after the remand from this Court's decision, the Ninth Circuit held improper as a matter of law a district court's refusal, on the ground that continued monitoring was necessary in order to prevent resegregation, to relinquish jurisdiction over the school board. The Ninth Circuit ordered that all injunctive orders be vacated and that the jurisdiction of the district court over the case be terminated. (Again, there was no express finding that the school district was "unitary.")

The decision below is in conflict with the Ninth Circuit's decision for the further reason that it approved as grounds for continuance of jurisdiction reasons substantially identical with those which were rejected by the Ninth Circuit as insufficient as a matter of law. Thus the court of appeals in this case upheld the district court's order "retaining supervisory jurisdiction over the Denver public schools" on the basis of the district court's "belie[f] that the district was both without the ability and without the will to ensure that the effects of prior segregation did not resurface." App. A16. Exactly the same kinds of justification had been advanced by the district court in the *Spangler* case, and the court of appeals held that such apprehensions about the future actions of the school board could not justify continued displacement of the board's interest in "managing [its] own affairs, consistent with the Constitution." 611 F.2d at 1241; *see also id.* at 1244-47 (concurring opinion of Kennedy, J.).

II. The Vagueness Of The Injunction As Upheld By The Court Of Appeals Calls For The Exercise Of This Court's Supervisory Power.

The very terms of the interim injunction entered by the district court underscore the difficulties inherent in replacing a satisfied remedial order with some "looser" standard of judicial restraint on a school board's discretion.

In its *Spangler* decision this Court reversed the court of appeals in part because that court's opinions had left the school board without clear guidance as to its obligations under the then-existing decree. The Court said:

> Violation of an injunctive decree such as that issued by the District Court in this case can result in punishment for contempt in the form of either a fine or imprisonment. . . . Because of the rightly serious view courts have traditionally taken of violations of injunctive orders, and because of the severity of punishment which may be imposed for such violation, such orders must in compliance with Rule 65 be specific and reasonably detailed.

427 U.S. at 438-39.

In *Spangler* the uncertainty was due to the court of appeals' ambiguous resolution of the issue whether a provision of the injunction should be stricken. Here the uncertainty lies both in the injunction itself and from the gloss put on it by the court of appeals.

The heart of the district court's injunction in this case lies in its prohibition against the existence ("operation") of any schools that are "racially identifiable" as a result of Board actions. App. E6, ¶2. The prohibition is made specifically applicable to school construction and abandonment. App. E6, ¶3. Thus the Board is forbidden from tak-

ing any action that may result in any school's becoming "racially identifiable."[11]

It is well recognized that the term "racially identifiable" has no fixed meaning in school desegregation cases. *See, e.g., Morgan v. Nucci*, 831 F.2d at 319-20; *Price v. Denison Independent School District*, 694 F.2d 334, 353-64 (5th Cir. 1982). No one has suggested any way of measuring racial identifiability except by arithmetic ratios. Yet the district court declined to provide the Board with any standard to guide it, while putting the Board at its peril of violating an injunction if some action of the Board were subsequently deemed to have crossed some imaginary line resulting in "racial identifiability." Noting the Board's concern that that term is too indefinite and "may be construed to mean an affirmative duty broader than that required by the Equal Protection Clause," the district court brushed the concern aside with the non sequitur that the prohibition applies only to Board "actions" that may result in racial identifiability (or "substantial disproportionality"). App. E5.

The court of appeals declined to eliminate the provision, or to modify it except to say that it "should not be interpreted to require that racial balance in any school . . . necessarily reflect the racial proportions in the district as a whole." App. A21. That qualification of course does not address the problem. The question is not whether each school must reflect the racial proportions "in the district

[11] In forbidding the existence of *any* racially identifiable school, as the provision clearly implies, the prohibition flies in the face of the statement in *Swann* that "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law." 402 U.S. at 26.

as a whole" (for no one would suppose that it must do so) but *what* racial proportions each school must reflect.

Paradoxically, the court of appeals did order the elimination of Paragraph 4 of the decree, on the ground that it was no more than an injunction to obey the law.[12] App. A18. But an injunction to "obey the law" is, in this case, far more specific in its guidance than the provisions of the injunction the court left untouched. Since the "law" applicable is the Fourteenth Amendment, a school board enjoined to obey the law knows that the forbidden line is intentional discrimination. A conscientious board knows how to obey that law, and such an injunction puts it at no greater peril than the Fourteenth Amendment itself.

An injunction to "avoid racial identifiability," with no standard to say what that means, is as serious an impairment of the autonomy and discretion of a school board in managing the educational affairs of a school district as an injunction prescribing in detail the student assignment plan to be followed. It means that the Board will act at its peril whenever it takes any action that may have an adverse impact on the racial proportions in any school in the district. Rather than conferring freedom on the Board, as the district court professed a desire to do, it merely places the Board in constant peril of future judicial intervention in the form of contempt proceedings (as well as

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[12] The paragraph provided:

> The duty imposed by the law and by this interim decree is the desegregation of schools and the maintenance of that condition. The defendants are directed to use their expertise and resources to comply with the constitutional requirement of equal educational opportunity for all who are entitled to the benefits of public education in Denver, Colorado.

App. E6.

continued extension of judicial control) and thus greatly inhibits the good-faith conduct of the enterprise for which the Board has responsibility.

An obvious reason why neither the district court nor the court of appeals wished to make the decree more specific is that, while there is no way to do so except by providing arithmetic guidelines, such guidelines, imposed after full implementation of a remedial plan, would clearly contravene this Court's declarations that the Constitution does not require any prescribed degree of racial balance in the public schools. But that obstacle is not overcome by cloaking the required racial balance in the vague test of "racial identifiability," leaving it to the enjoined party to guess what the prescribed degree of racial balance is. The vagueness only compounds the fundamental substantive objection to the injunction.

Thus the vagueness that infects the new supervisory decree in this case is more than a departure from the requirement of Rule 65, Fed. R. Civ. P., and this Court's ruling in *Spangler*. It is a difficulty inherent in any effort to prescribe permanent or continuing obligations of a school board once it is determined that the board need no longer adhere to a prescribed remedial plan. This problem helps make clear why the courts of appeals for the First, Fifth, and Ninth Circuits have concluded that once a school district has fulfilled the prescribed remedy for a constitutional violation a district court should vacate prior orders and relinquish its control, leaving the board subject only to its constitutional obligation not to engage in intentional discrimination on account of race. *See Morgan v. Nucci*, 831 F.2d 313; *United States v. Overton*, 834 F.2d 1171 (5th Cir. 1987); *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239.

The fundamental issue raised by the Tenth Circuit's decision in this case, as in its decision in the *Dowell* case, is whether the measure of a school district's obligation to maintain a unitary system, after completion of a remedy for eliminating a previously discriminatory student assignment system, is discriminatory intent or maintenance of some prescribed (or unprescribed) degree of racial balance, regardless of other educational considerations. Certiorari should be granted in this case, in addition to the *Dowell* case, not only because the issues in the two cases are closely related but also because, if the example set by this case is permitted to stand, school boards may be subjected to the constraints of judicial supervision indefinitely and long after full compliance with a comprehensive remedial plan has been maintained for many years.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX A

[JANUARY 30, 1990]

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 85-2814 & 87-2634

WILFRED KEYES, et al.,

Plaintiffs-Appellees,

and

CONGRESS OF HISPANIC EDUCATORS, et al.,

Plaintiffs/Intervenors-Appellees,

v.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Colorado
(D.C. Civil No. C-1499)

Phil C. Neal of Neal, Gerber, Eisenberg & Lurie, Chicago, Illinois (Michael H. Jackson of Semple & Jackson, Denver, Colorado, with him on the brief) for Defendants-Appellants.

Gordon G. Greiner of Holland & Hart, Denver, Colorado, for Plaintiffs-Appellees (James M. Nabrit, III, New York, New York, with him on the brief for Plaintiffs-Appellees; Norma V. Cantu of Mexican American Legal Defense and Educational Fund, Inc., San Antonio, Texas, and Peter Roos, San Francisco, California, with him on the brief for Plaintiffs/Intervenors-Appellees).

Wm. Bradford Reynolds, Assistant Attorney General, Roger Clegg, Deputy Assistant Attorney General, and David K. Flynn, Attorney, Department of Justice, Washington, D.C., filed a brief on behalf of the United States as amicus curiae.

Before LOGAN, SETH and ANDERSON, Circuit Judges.

LOGAN, Circuit Judge.

This is yet another chapter in the slow and acrimonious desegregation of Denver Public School District No. 1. In the district court, the school district moved for a declaration that it had attained unitary status and for the termination of this case and of the court's continuing jurisdiction over operation of the schools. The court denied both requests and later ordered the district to prepare a plan for further desegregation of certain schools and programs that it believed were preventing the district from attaining unitary status. Case number 85-2814 is the district's appeal from the court's denial of its motion for termination of continuing jurisdiction and from the court's later order. Case number 87-2634 is the district's appeal from the court's order approving the district's response but retaining jurisdiction, and its subsequent "interim decree" in which the court eliminated reporting requirements and

mandated certain general desegregation actions. The court styled its "interim decree" an intermediate step towards a final, permanent injunction.

I

This case began in 1969 when plaintiffs, parents of children then attending the Denver public schools, sought an injunction against the school district's rescission of a proposed voluntary desegregation plan. Since that time the parties have made many trips to the courthouse, resulting in numerous opinions, including two by this court and one by the full Supreme Court of the United States.[1] In the instant appeals we are concerned primarily with the district court's actions in *Keyes XIV* through *Keyes XVII*.

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[1] *See Keyes v. School Dist. No. 1*, 303 F. Supp. 279 (D. Colo. 1969) (*Keyes I*), *modified*, 303 F. Supp. 289 (D. Colo. 1969) (*Keyes II*), *order reinstated*, 396 U.S. 1215 (1969) (Brennan, J. in chambers) (*Keyes III*); *Keyes v. School Dist. No. 1*, 313 F. Supp. 61 (D. Colo. 1970) (*Keyes IV*); *Keyes v. School Dist. No. 1*, 313 F. Supp. 90 (D. Colo. 1970) (*Keyes V*), *aff'd in part and rev'd in part*, 445 F.2d 990 (10th Cir. 1971) (*Keyes VI*), *cert. granted*, 404 U.S. 1036 (1972) and *cert. denied sub. nom School Dist. No. 1 v. Keyes*, 413 U.S. 921 (1973), *modified and remanded*, 413 U.S. 189 (1973) (*Keyes VII*), *on remand*, 368 F. Supp. 207 (D. Colo. 1973) (*Keyes VIII*) and 380 F. Supp. 673 (D. Colo. 1974) (*Keyes IX*), *aff'd in part and rev'd in part*, 521 F.2d 465 (10th Cir. 1975) (*Keyes X*), *cert. denied*, 423 U.S. 1066 (1976); *Keyes v. School Dist. No. 1*, 474 F. Supp. 1265 (D. Colo. 1979) (*Keyes XI*); *Keyes v. School Dist. No. 1*, 540 F. Supp. 399 (D. Colo. 1982) (*Keyes XII*); *Keyes v. School Dist. No. 1*, 576 F. Supp. 1503 (D. Colo. 1983) (*Keyes XIII*); *Keyes v. School Dist. No. 1*, 609 F. Supp. 1491 (D. Colo. 1985) (*Keyes XIV*); I R. Tab 29, *Keyes v. School Dist. No. 1*, No. C-1499 (D. Colo. Oct. 29, 1985) (*Keyes XV*) (Order for Further Proceedings); *Keyes v. School Dist. No. 1*, 653 F. Supp. 1536 (D. Colo. 1987) (*Keyes XVI*); *Keyes v. School Dist. No. 1*, 670 F. Supp. 1513 (D. Colo. 1987) (*Keyes XVII*).

From 1974, *see Keyes IX*, 380 F. Supp. 673, to the present the school district has operated under a court-ordered desegregation plan, which occasionally has been modified with the district court's approval. *See, e.g., Keyes XII*, 540 F. Supp. at 404; *Keyes XI*, 474 F. Supp. at 1276. In 1984 the district moved for an order declaring the Denver schools unitary, dissolving the injunction as it related to student assignments, and terminating the court's jurisdiction in the case. Plaintiffs opposed the motion and moved for an order directing the school district to prepare and submit numerous plans and policies to remedy what they considered shortcomings in the district's desegregation efforts. The court held a full hearing on the motions and later filed an opinion denying the district's motion, but refusing to rule on plaintiffs' motion pending further negotiations between the parties. *Keyes XIV*, 609 F. Supp. at 1521-22.

In its opinion, the court rejected the district's argument, *id.* at 1498, that compliance for an extended period of time with the 1974 court-approved desegregation plan, as modified in 1976, entitled the district to a declaration of unitariness. The court reasoned that the district's argument hinged on the thesis that the "1974 Final Judgment and Decree, as modified in 1976, was a complete remedy for all of the constitutional violations found in this case." *Id.* However, the court had indicated at the time of its 1976 order that further remedial changes would be necessary in the future. *Id.* at 1500.

The court supported its factual finding that the district was not unitary by placing weight on the following factors: its recognition in 1979 and the school board's recognition in 1980 that the district was not yet unitary, *id.* at 1501; the board's uncooperative attitude in recent years, *id.* at 1505; the board's recognition in one of its resolutions that

compliance with the court-approved plan was insufficient, in itself, to desegregate the district's schools, *id.* at 1506; the increasing resegregation at three schools, *id.* at 1507; the district's misinterpretation of the faculty/staff assignment policy so that the fewest number of minority teachers would be placed in previously predominantly Anglo schools, *id.* at 1509-12; and the district's "hardship transfer" policy, which the court found was implemented with "a lack of concern about the possibility of misuse and a lack of monitoring of the effects of the policy," *id.* at 1514. In addition, the court believed that the district had not given adequate assurances that resegregation would not occur if the court terminated jurisdiction, *id.* at 1515, and that in any event, even if the board affirmatively tried to prevent resegregation, it would be compelled to comply with Colo. Const. Art. IX § 8 which outlaws "forced busing," compliance with which certainly would cause drastic resegregation of Denver's schools. *Keyes XIV*, 609 F. Supp. at 1515. Finally, the court noted that mere statistics indicating general integration in student assignments were insufficient to compel a finding of unitariness, *id.* at 1516, and indicated that the board had neither the understanding of the law nor the will to contravene community sentiment against busing that would be necessary for the district to achieve and maintain a unitary school system. *Id.* at 1519, 1520.

Following this ruling and the parties' failure to negotiate a settlement of their differences, the court ordered the school district to prepare and submit a plan "for achieving unitary status . . . and to provide reasonable assurance that future Board policies and practices will not cause resegregation." *Keyes XV*, I R. Tab 29 at 2. Specifically, the court ordered the board to address four problem areas: (1) three elementary schools, Barrett, Harrington, and Mit-

chell, that were racially identifiable as minority schools; (2) the district's hardship transfer policy; (3) the assignment of faculty; and (4) plans to implement board Resolution 2233, which states the board's commitment to operation of a unitary school system. *Id.* at 2-3. It is from this order and the court's ruling in *Keyes XIV* that the school district appeals in case number 85-2814.

In February 1987, the district court noted that the board had responded positively to its order in *Keyes XV*, but that the plaintiffs still had ample reason for their concerns about the district's ability or willingness to achieve and maintain a unitary system. *Keyes XVI*, 653 F. Supp. at 1539-40. Nevertheless, the court cited the community's interest in controlling its school district and decided "that it is time to relax the degree of court control over the Denver Public Schools." *Id.* at 1540. At the same time, the court concluded that a permanent injunction should be constructed, in part because one board's resolutions could not bind a subsequent board, and the constitutional duty was to *maintain*, not simply achieve, a desegregated, unitary school system. *Id.* at 1541-42.

Later in 1987, the district court issued an "interim decree" that eliminated reporting requirements and allowed the school district to make changes in the desegregation plan without prior court approval. *Keyes XVII*, 670 F. Supp. at 1515. The court attempted to fashion an injunction sufficiently specific to meet the requirements of Fed. R. Civ. P. 65(d), while at the same time allowing the board to operate "under general remedial standards, rather than specific judicial directives." *Id.* The court summarized its order as enjoining "governmental action which results in racially identifiable schools," *id.* at 1516, and said its decree was a step towards a final decree that would terminate the court's supervisory jurisdiction and the litigation's

remedial phase. *Id.* In case number 87-2634, the district appeals the court's February 1987 order and its later "interim decree."

II

Plaintiffs assert, as an initial matter, that this court does not have jurisdiction over case number 85-2814. Specifically, plaintiffs argue that subsequent orders of the district court have superseded *Keyes XIV*, and thus any appeal from the decision is moot. In the alternative, they contend that the court's "refusal to issue a declaratory judgment that a defendant has complied with an injunction," *see* Joint Brief of Appellees at 1, is not an appealable injunctive order under 28 U.S.C. § 1292(a)(1), the school district's asserted basis for appellate jurisdiction. In addition, plaintiffs argue that the appeal from *Keyes XV*, the court's order for the district to submit certain desegregation plans, also is mooted by the interim decree and was not an injunctive order under 28 U.S.C. § 1292(a)(1).

We hold that the school district's appeal from *Keyes XIV* is not moot and that we have jurisdiction to consider the appeal. A case becomes moot when the controversy between the parties no longer is "live" or when the parties have no cognizable interest in the appeal's outcome. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam); *Wiley v. NCAA*, 612 F.2d 473, 475 (10th Cir. 1979) (en banc), *cert. denied*, 446 U.S. 943 (1980). Here, however, a decision favorable to the school district, reversing the district court's ruling that the school system was not unitary, or even remanding the question for further consideration, would give the district some relief from the court's order. The court's later orders do not supersede *Keyes XIV*, but rather emanate from and supplement that opin-

ion's ruling that the school district is not unitary. *Cf. Battle v. Anderson*, 708 F.2d 1523, 1527 (10th Cir. 1983), *cert. dismissed sub. nom. Meachum v. Battle*, 465 U.S. 1014 (1984). The appeal from *Keyes XIV* is not moot.

In addition, we have jurisdiction over the appeal from *Keyes XIV* because the denial of the district's motion for a declaration of unitariness constitutes an interlocutory order "continuing" an injunction. *See* 28 U.S.C. § 1292(a)(1). We agree with plaintiffs that denial of the district's motion did not "modify" any prior injunctive order of the court, but the court's order plainly resulted in a continuation of the injunctive decree mandating desegregation of the Denver schools. Because we reject plaintiffs' characterization of the court's order as a "refusal to issue a declaratory judgment," we need not address whether the district has made a sufficient showing to appeal the denial of an injunctive order. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 379 (1987).

We hold, however, that the appeal from *Keyes XV* is moot. That order merely required the district to submit certain plans to the court, and the district fully complied long ago. Because the district has no legal interest in our disposition of the appeal from that order, and because no decision by this court could grant the district any effectual relief from the order, *Keyes XV* is moot and the appeal from it dismissed. *See International Union, UAW v. Telex Computer Prods., Inc.*, 816 F.2d 519, 522 (10th Cir. 1987); *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir. 1986). The other part of the appeal in case number 87-2634, dealing with *Keyes XVII*'s "interim decree," is properly before us, of course, as it modified the court's earlier injunction. 28 U.S.C. § 1292(a)(1).

III

The school district's contentions in No. 85-2814 can be summarized as follows: (1) because the district's long-term compliance with the 1974 decree, as subsequently modified, has remedied any constitutional violation, the court now must terminate its jurisdiction over student assignments; (2) the district court's findings, which are not challenged on appeal, that the school system is not unitary regarding faculty assignments and hardship transfer policy, do not prevent student assignments from being unitary; (3) because there is no constitutional right to any particular racial balance in a school's student body, the district court erred in focusing on the racial identity of three elementary schools and in demanding future maintenance of racial balance; (4) concerns about the present or future segregative effects of board actions (especially implementation of a neighborhood school policy) are irrelevant to a determination of unitariness because discriminatory impact does not violate the Constitution nor does it justify the court's continued jurisdiction; and (5) there is no evidence that this or future boards will act with segregative intent. The United States, as amicus curiae, generally agrees with the district, and argues that a court must terminate jurisdiction when it finds the district to be unitary, a finding it must make when the district has in good faith fully implemented a court-approved desegregation plan.

A

We begin at the beginning, with the proposition announced in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (*Brown I*), that a state violates the Equal Protection Clause of the Fourteenth Amendment when it intentionally segregates or tolerates the segregation of public school students

on the basis of race. Where no statutory dual system ever existed, such as in Denver, a plaintiff proves a violation of the Fourteenth Amendment by showing the existence of segregated schools and the maintenance of that segregation by intentional state action. *Keyes VII*, 413 U.S. at 198. The school district does not remedy these violations by simply halting its intentionally discriminatory acts and adopting racially neutral attendance policies. Rather, as the Supreme Court later held, the affirmative constitutional duty to desegregate expressed in *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), requires school boards to *dismantle* their dual school systems. *Green v. County School Bd. of New Kent County*, 391 U.S. 430, 437-38 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 28 (1971); *see also Keyes VII*, 413 U.S. at 222-23 (Powell, J., concurring and dissenting). The Supreme Court has noted that the primary duty to desegregate and eliminate racial discrimination in public education rests with the local school boards. *Brown II*, 349 U.S. at 299. In fact, the school board has an affirmative duty under the Constitution to remedy past de jure discrimination and eliminate its effects, and "[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Bd. of Education v. Penick*, 443 U.S. 449, 459 (1979). It is irrelevant that the school district does not intend to perpetuate the prior intentional segregation because "the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a school system is the effectiveness, not the purpose, of actions in decreasing or increasing the segregation caused by the dual system." *Dayton Bd. of Education v. Brinkman*, 443 U.S. 526, 538 (1979) (*Dayton II*).

When the school district defaults on its obligation to stop segregative acts and remedy their effects, a federal

court in a properly-instituted case must order a remedy, and in so doing it may employ its full powers as a court of equity. *Milliken v. Bradley*, 433 U.S. 267, 281 (1977) (*Milliken II*); *Swann*, 402 U.S. at 15. The court's remedial authority, however, is not plenary but extends only to the breadth of the violation proven. *Milliken II*, 433 U.S. at 282. A valid desegregation remedy must meet three requirements: (1) it must be tailored to the nature and scope of the constitutional violation; (2) it must be designed to restore the discrimination victims to the position they would have occupied had the discrimination not occurred; and (3) it must take into account the interest of state and local authorities in themselves managing the public schools. *Id.* at 280-81. But, within these parameters, a district court may order remedial programs even in areas in which intentional discrimination has not existed, if it concludes that the remedy is necessary to "treat the *condition* that offends the Constitution," and that "the constitutional violation caused the condition for which remedial programs are mandated." *Id.* at 282, 286 n.17 & 287 (emphasis added); *Keyes VII*, 413 U.S. at 205 (defining de jure segregation as "a current *condition* of segregation resulting from intentional state action") (emphasis added).

Because desegregation remedial orders are equitable in nature, we review them only for abuses of discretion. *Wright v. Council of Emporia*, 407 U.S. 451, 470-71 (1972); *Diaz v. San Jose Unified School Dist.*, 861 F.2d 591, 595 (9th Cir. 1988). Thus, so long as a remedy is tailored to the violation, it need not be the least restrictive of the available options. *Swann*, 402 U.S. at 31 (appellate court will not overturn remedy if it is "reasonable, feasible and workable"); *United States v. Yonkers Bd. of Education*, 837 F.2d 1181, 1236 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988); *see also United States v. Paradise*, 480 U.S. 149, 184 (1987) (plurality opinion). Of course, the

court may modify even a final decree if changing circumstances indicate the need for a modification. *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 437 (1976); *Dowell ex rel. Dowell v. Board of Education of Oklahoma City Pub. Schools*, 795 F.2d 1516, 1520-21 (10th Cir.) (*Dowell I*), *cert. denied*, 479 U.S. 938 (1986).

Once a school district has eliminated all intentional racial discrimination, and eradicated all effects of such discrimination, the court may declare it unitary. *Green*, 391 U.S. at 439-40; *Brown II*, 349 U.S. at 301. Although the Supreme Court has not defined precisely what facts or factors make a district unitary, a starting point is to evaluate the factors that make a system segregated. In the context of a unitariness decision, these factors include elimination of invidious discrimination in transportation of students, integration of faculty and staff, equality of financial support given to extracurricular activities at different schools and integration of those activities, nondiscriminatory construction and location of new schools, and assignment of students so that no school is considered a white or black school. *E.g.*, *Swann*, 402 U.S. at 18-19; *United States v. Montgomery County Bd. of Education*, 395 U.S. 225, 231-32 (1969). This court has defined "unitary" as the elimination of invidious discrimination and the performance of every reasonable effort to eliminate the various effects of past discrimination. *Dowell ex rel. Dowell v. Board of Education, Oklahoma City Pub. Schools*, No. 88-1067, slip op. at 19 & n.15 (10th Cir. Oct. 7, 1989) (*Dowell II*); *Brown v. Board of Education*, No. 87-1668, slip op. at 16 (10th Cir. Dec. 11, 1989). In so defining "unitariness," we recognize that racial balance in the schools is no more the goal to be attained than is racial imbalance the evil to be remedied. *See Spangler*, 427 U.S. at 434; *Swann*, 402 U.S. at 24. Therefore, a court is without power to order con-

stant adjustments in the assignment of students, merely to maintain a certain racial balance. *Spangler*, 427 U.S. at 436-37. But, we also recognize that when a school board has a duty to liquidate a dual system, its conduct is measured by "the effectiveness, not the purpose, of [its] actions in decreasing or increasing segregation caused by the dual system." *Dayton II*, 443 U.S. at 538. The existence of racially identifiable schools is strong evidence that the effects of de jure segregation have not been eliminated. *Swann*, 402 U.S. at 26.

Long-term compliance with a desegregation plan that is complete by its own design and does not contemplate later judicial reappraisal entitles the school district to a declaration of unitariness. *Spangler*, 427 U.S. at 435-37; *see Spangler v. Pasadena City Bd. of Education*, 611 F.2d 1239, 1243, 1244 (9th Cir. 1979) (Kennedy, J., concurring) (because desegregation plan was "a full and complete remedy," compliance with plan for nine years, in light of nature and degree of violation, sufficient to make district unitary). Whether the plan was in fact a complete remedy for the violation requires both an examination of the original violation, and, as the district court noted here, an examination of the actual effects of the plan. *Keyes XIV*, 609 F. Supp. at 1506; *cf. Dayton II*, 443 U.S. at 538. Thus, compliance with even a court-approved desegregation plan, by itself and without proof of the executed plan's intention and effect, does not make a district unitary. *Pitts v. Freeman*, 755 F.2d 1423, 1426 (11th Cir. 1985); *United States v. Texas Educ. Agency*, 647 F.2d 504, 508 (5th Cir. Unit A 1981). Of course, while a district is not unitary, the court must maintain supervisory jurisdiction and may require prior approval of various board actions. *Swann*, 402 U.S. at 30; *Brown II*, 349 U.S. at 301 (during transition to unitary system, court *will* retain jurisdiction). Dur-

ing this "pre-unitariness" period the board bears a " 'heavy burden' of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends." *Dayton II*, 443 U.S. at 538 (citation omitted).

B

The district court's finding that the school district had not achieved unitary status is a factual one which we review under a clearly erroneous standard. *Brown*, slip op. at 15; *see also id.*, dissenting slip op. at 3, 52 (Baldock, J., dissenting). Applying the principles discussed above and this standard, we cannot conclude that the district court was clearly erroneous in holding that the school district's pupil assignment policies were nonunitary.

As an initial matter, we agree with the school district that it may be declared unitary in certain aspects, even though other aspects remain "nonunitary." *See, e.g., Spangler*, 427 U.S. at 436-37; *id.* at 442 (Marshall, J., dissenting); *Morgan v. Nucci*, 831 F.2d 313, 318 (1st Cir. 1987). Just as a remedy must be tailored to fit the scope of the violation, *Milliken II*, 433 U.S. at 280-81, 282; *Dayton I*, 433 U.S. at 420, so must the court relinquish supervisory control over a school district's attendance policies and decisions when the need for that close supervision no longer exists. *See Jackson County*, 794 F.2d at 1543 ("continuing involvement," though not necessarily permanent injunction, must terminate when no more constitutional violations exist to justify continuing supervision). But even so, the district makes virtually no argument here that the district court was clearly erroneous in rejecting the district's evidence and concluding that the district had failed to prove that existing resegregation resulted from demographic changes and not from actions of the board. *See Keyes*

XIV, 609 F. Supp. at 1507-08. Our independent review of the record reveals nothing that would compel us to overturn the court's refusal to find convincing the district's evidence. Before the declaration of unitariness it is the district's burden to prove resegregation has resulted from demographic changes and not from actions of the board. *See Dayton II*, 443 U.S. at 538.

Instead of arguing that the district court was wrong on the facts, the district argues that the court was wrong on the law. In one respect, we agree. As noted above, a district may be declared unitary in some respects and not others. The district court appears to have held to the contrary, *see Keyes XIV*, 609 F. Supp. at 1508, 1517, and if that was its intention, it erred. But the error is harmless because the record evidence adequately supports the court's specific finding that *student assignments* are non-unitary.[2]

We reject the district's other argument which, in essence, is that as a matter of law three racially identifiable elementary schools out of about eighty cannot prevent a school district from attaining unitary status.[3] A few racially identifiable schools do not, as a matter of course, prevent a district from being unitary. *Swann*, 402 U.S. at

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[2] The district court viewed the 1974 desegregation plan, as modified in 1976, as one that was not intended to be complete in itself; rather, the court and the district had "the expectation that changes would be required in future years." *Keyes XIV*, 609 F. Supp. at 1506. That is also our reading of the record and the history of the litigation. Thus, in this respect this case is unlike *Spangler*, which the district relies upon so heavily. *See Spangler*, 611 F.2d at 1243.

[3] The district does not here dispute the standard employed by the district court in determining whether a school is "racially identifiable."

26. Yet, the existence of such schools, especially when they once have been eliminated and then resurface as a result of board action, is strong evidence that segregation and its effects have not been eradicated. *See Columbus Bd. of Education v. Penick*, 443 U.S. 449, 460-61 (1979). Even if only a few of many schools are racially identifiable, the district has the burden of showing that such schools are nondiscriminatory and that their composition is not the result of present or past discrimination.[4] *Dayton II*, 443 U.S. at 538; *Swann*, 402 U.S. at 26. The district court found that the district had not met its burden. The district argues that all it had to prove was that the resegregation was not the result of new, intentional segregation. As explained above, this proof is insufficient.

The district court believed that the district was both without the ability and without the will to ensure that the effects of prior segregation did not resurface. *Keyes XVII*, 670 F. Supp. at 1515; *Keyes XVI*, 653 F. Supp. at 1540; *Keyes XIV*, 609 F. Supp. at 1515, 1520. We consider this a fact-finding of the district court to which we must give deference. *See Penick*, 443 U.S. at 470 (Stewart, J., concurring in judgment). Thus, we must uphold the district court's order retaining supervisory jurisdiction over the Denver public schools.

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[4] That the number of racially identifiable schools here—three out of about eighty elementary schools—is a smaller percentage than that found to be constitutionally acceptable in *Spangler*, where five of thirty-two schools were racially identifiable, is only marginally relevant. The unitariness determination was and is a fact-bound decision, and when unitariness is achieved will differ with each different school district.

IV

We turn now to No. 87-2634, the district's appeal of the district court's "interim decree" set out in *Keyes XVII*, 670 F. Supp. at 1516-17. That modification of the court's prior injunction was intended to relax the court's control and allow the school district to make changes without prior approval. *Id.* at 1515. The interim decree attempted to strike a balance between allowing the district to regain control of student assignments while also ensuring that the board would not adopt a student attendance policy discriminatory in practice and impact. *See Penick*, 443 U.S. at 464, 465 n.13 (irrelevant that present acts have little incremental segregative impact if they, in combination with previous segregative acts, have natural and foreseeable consequence of disparate impact on minorities).

Some of the complaints about the interim decree relate to the district's contention that we should override the district court's finding of nonunitariness, at least as to pupil assignment. But the district also asserts that the interim injunction is indefinite, vague, and in violation of Fed. R. Civ. P. 65(d). That rule requires that an injunction be reasonably specific in identifying what acts are prohibited or required, both to give notice to the defendant of what is prohibited, and to guide an appellate court in reviewing the defendant's compliance or noncompliance with the injunction. *Schmidt v. Lessard*, 414 U.S. 473, 476-77 (1974); *Daniels v. Woodbury County*, 742 F.2d 1128, 1134 (8th Cir. 1984). An injunction "too vague to be understood" violates the rule, *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967), and, generally, injunctions simply requiring the defendant to obey the law are too vague. *E.g., City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 991 & n.18 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

Paragraph 4 of the interim decree does no more than require the district to obey the law, and therefore must be stricken.[5] *Payne v. Travenol Labs., Inc.*, 565 F.2d 895,

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[5] The interim decree, in its entirety, states:

ORDERED AND ADJUDGED:

1. The defendants, their agents, officers, employees and successors and all those in active concert and participation with them, are permanently enjoined from discriminating on the basis of race, color or ethnicity in the operation of the school system. They shall continue to take action necessary to disestablish all school segregation, eliminate the effects of the former dual system and prevent resegregation.

2. The defendants are enjoined from operating schools or programs which are racially identifiable as a result of their actions. The Board is not required to maintain the current student assignment plan of attendance zones, pairings, magnet schools or programs, satellite zones and grade-level structures. Before making any changes, the Board must consider specific data showing the effect of such changes on the projected racial/ethnic composition of the student enrollment in any school affected by the proposed change. The Board must act to assure that such changes will not serve to reestablish a dual school system.

3. The constraints in paragraph 2 are applicable to future school construction and abandonment.

4. The duty imposed by the law and by this interim decree is the desegregation of schools and the maintenance of that condition. The defendants are directed to use their expertise and resources to comply with the constitutional requirement of equal education opportunity for all who are entitled to the benefits of public education in Denver, Colorado.

5. The District retains the authority to initiate transfers for administrative reasons, including special education, bilingual education and programs to enhance voluntary integration. The defendants shall maintain an established policy to prevent the frustration, hindrance or avoidance of a District student assignment plan through parent initiated transfers and shall use administrative procedures to investigate, validate and authorize transfer requests using criteria established by the Board. If transfers are sought on grounds of 'hardship', race, color or ethnicity will not be a valid basis upon which to demonstrate

(Footnote continued on following page)

[5] *continued*

'hardship'. The defendants shall keep records of all transfers, the reasons therefor, the race, color or ethnicity of the student, and of the effects on the population of the transferee and transferor schools.

6. No student shall be segregated or discriminated against on account of race, color or ethnicity in any service, facility, activity, or program (including extracurricular activities) conducted or sponsored by the school in which he or she is enrolled. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities and activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, shall be open to all persons without regard to race, color or ethnicity. The District shall provide its resources, services and facilities in an equitable, nondiscriminatory manner.

7. The defendants shall maintain programs and policies designed to identify and remedy the effects of past racial segregation.

8. The defendants shall provide the transportation services necessary to satisfy the requirements of this interim decree notwithstanding the provisions of Article IX, Section 8 of the Colorado Constitution.

9(A). The principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial or ethnic composition of a staff indicate that a school is intended for minority students or anglo students.

(B). Staff members who work directly with children, and professional staff who work on the administrative level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color or ethnicity.

(C). Defendants are required to use an effective affirmative action plan for the hiring of minority teachers, staff and administrators with the goal of attaining a proportion which is consistent with the available labor force; the plan shall contain yearly timetables and a reasonable target date for the attainment of the affirmative action goals.

10. The District will continue to implement the provisions of the program for limited English proficiency students heretofore approved by the Court in the Language Rights Consent

(Footnote continued on following page)

897-98, 900 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978). The same would be true of paragraphs 1 and 7, except that such provisions must be understood as continuing in effect the prior injunction which placed upon the district a continuing duty to disestablish a formerly dual system. Given the court's finding that unitariness has not yet been achieved, even in pupil assignments, such continuing prohibitions, though stated in general terms, are not objectionable. We construe the statement of the district's duties to take action to disestablish and eliminate the effects of past racial segregation as an order that will terminate once the district is declared unitary, *see Swann*, 402 U.S. at 32. It would be better to say so explicitly, but we do not require that statement be placed into what is specifically designated an "interim" decree.

The prohibition on enforcement of Colorado's anti-busing constitutional provision, in paragraph 8, may be unnecessary, but given the district's admission that the anti-busing amendment is unconstitutional it cannot complain. Further, this prohibition gives the district legal author-

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[5] *continued*

Decree of August 17, 1984. Nothing in this interim decree shall modify or affect the Language Rights Consent Decree of August 17, 1984, and the prior orders entered in this case relating thereto shall remain in full force and effect.

11. It is further provided that this interim decree is binding upon the defendant Superintendent of Schools, the defendant School Board, its members, agents, servants, employees, present and future, and upon those persons in active concert or participation with them who receive actual notice of this interim decree by personal service or otherwise.

12. This interim decree, except as provided herein, shall supersede all prior injunctive orders and shall control these proceedings until the entry of a final permanent injunction.

Keyes XVII, 670 F. Supp. at 1516-17.

ity to disregard the Colorado provision. *See Swann*, 402 U.S. at 45.

Paragraphs 2, 9(A), and 9(C) should not be interpreted to require that racial balance in any school or department necessarily reflect the racial proportions in the district as a whole, as there is no constitutional right to any particular level of integration. *Spangler*, 427 U.S. at 436-37. On remand, the district court should make this clear.

Other than those discussed above, we have no objection to the district court's decree. It is a commendable attempt to give the board more freedom to act within the confines of the law. We recognize the difficulty in drafting an injunction that will allow the district maximum latitude in formulating policies, while at the same time making the injunction sufficiently specific. The degree of specificity necessary may be determined in light of the difficult subject matter. *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir. 1987); *Common Cause v. NRC*, 674 F.2d 921, 927 (D.C. Cir. 1982). Should contempt proceedings ever be necessary, of course, any ambiguity in the injunction will inhere to the district's benefit. *See Ford v. Kammerer*, 450 F.2d 279, 280 (3d Cir. 1971); *see also United States v. Holtzman*, 762 F.2d 720, 726 (9th Cir. 1985) (injunctions not to be set aside unless "so vague that they have no reasonably specific meaning," but "all ambiguities or inconsistencies are resolved in favor of the person subject to the injunction").

We understand the school district's struggle to be free from judicial supervision and control. We also recognize the district's frustration with not knowing its precise obligations under the Constitution. At the same time, it is the district court's duty, and ours, to enforce the Constitution and protect the rights it grants, including the

right of each public school student to attend a school where intentional segregation is banished and its effects remedied. We recognize that the showings required to obtain unitariness are difficult to make. But when the district makes those showings is entirely within its own control. Although the desegregation "vehicle can carry only a limited amount of baggage," *Swann*, 402 U.S. at 22, in Denver the district has not accomplished all desegregation possible and practical.

The cause is remanded for the reconsideration of language changes in the interim decree, as set out in this opinion. In all other respects, it is AFFIRMED.

APPENDIX B

[June 3, 1985]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-1499

WILFRED KEYES, et al.,

Plaintiffs,

CONGRESS OF HISPANIC EDUCATORS, et al.,

Plaintiff-Intervenors,

v.

SCHOOL DISTRICT NO. 1, Denver, Colorado, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

The Board of Education of School District No. 1 seeks to end this case by moving for a determination that the District has provided an equal educational opportunity for all students and has remedied all past failures to comply with the requirements of the United States Constitution. More particularly, the matter now before this court is a motion, filed January 19, 1984, for entry of the following orders:

> 1. An order declaring that the Defendant School District is a unitary school system in the following respects: a) Faculty, b) Staff, c) Transportation, d) Extracurricular Activities, e) Facilities, and f) Composition of Student Body.

2. An order modifying and dissolving the injunction as it relates to the assignment of students to schools.

3. An order declaring that the remedy previously ordered in this case to correct the Constitutional violation as found has been implemented, and that there is no need for continuing court jurisdiction in the matter.

The purpose of the motion is set forth in the following paragraphs from it:

Throughout the proceedings herein, the Court has urged upon the parties the need to develop and define a process and procedure whereby the Court and the parties might have the opportunity to present evidence to the Court on the unitary nature of the district and the extent of the School District's compliance with the remedial orders of the Court, and for the need, if any, for continuing court jurisdiction over the affairs of School District No. 1.

The earliest definitions of a unitary school system enunciated six criteria to be considered by a court in its determination of whether a school system was dual or unitary. They included: Faculty, Staff, Transportation, Extracurricular Activities, Facilities, and Composition of Student Body. *Green v. County School Board*, 391 U.S. 430, 435 (1968) An analysis has been conducted by staff utilizing the criteria as set forth above, and the working definition of the unitary school system, as announced by this Court in its Memorandum and Opinion dated May 12, 1982. The School District is prepared to show to the Court its compliance with the criteria and with the Court's definition at an evidentiary hearing for that purpose.

Although the parties to the litigation have been before the Court on numerous occasions with respect to proposed changes in the orders as they relate to matters of pupil assignment, none of these hearings were designed to permit the parties to explore the

> extent to which the School District has fulfilled its remedial obligations; and, as a result, neither the parties nor the Court have had a full opportunity to examine the data and the evidence that bears upon the question of whether the School District has in fact fully implemented the court ordered remedy and that the remedy has accomplished its purpose.

The requested full evidentiary hearing was held in May, 1984, and the plaintiffs, defendants and intervenors have filed comprehensive briefs. The United States Department of Justice has also filed both pre-trial and post-trial memoranda as amicus curiae. The court is fully informed on the issues and arguments relevant to the motion.

GENERAL PRINCIPLES

The parties approach the issues and evidence in this case from different perspectives reflecting differing interpretations of the scope of the equal protection clause. Perhaps, as with visual perspectives, the difference is influenced by the relative positions of the parties. The Board of Education looks at the case from the high ground occupied by those holding the power of governance. In that position there may be a tendency to accept a more static overview of a somewhat distant scene characterized by stability and serenity. The plaintiffs/intervenors represent people whose historical disadvantages give them an alternate viewpoint. For those who are still deep in the valley, struggling for survival, and for those moving upward on the mountain, educational opportunity is the path to progress. They are on the move, seeing only transient scenery, and their primary concern is the direction of their movement. Is the trail going forward and upward, or downward and backward?

The difference between the parties may also be illustrated with a different analogy. The defendants ask that we look at the Denver school system by making detailed comparisons of enlarged aerial photographs taken in 1976 and 1984. The plaintiffs/intervenors ask us to view a movie film record of events from 1968 to 1984, with close-ups of a few of the frames at different intervals. The choice turns on conflicting interpretations of constitutional law based on alternative approaches in analyzing Supreme Court opinions.

That process of interpretation of constitutional law will also be affected by methodology in establishing viewpoint. Does one plumb the depths of the relevant opinions as a series of pools, or is it more appropriate to look at the Court's language as the flow of a meandering stream with eddies, backwaters and even changes of direction? The latter view is more consistent with the guiding role of the Court.[1] School desegregation cases differ from most litigation in that much of the evidence is developed while the case is in court. In most lawsuits, the court's focus

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[1] *See Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*):

> The opinions of [*Brown*], declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference.
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> . . .
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> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.

Id. at 298 (footnote omitted). *See, also* Schauer, *Refining the Lawmaking Function of the Supreme Court*, 17 U. Mich. J.L. Ref., 1-24 (1984).

is retrospective. The issues arise from historical events and the evidentiary disputes are resolved by the court's findings of the probabilities about matters which occurred in the past. In school desegregation cases, there are political and demographic changes which occur while the case is in court and even the court's processes and decrees—at least the public perception of them—can be factors influencing some of those changes. It is also important to remember that the applicable principles of constitutional law have evolved under circumstances of change in the characteristics of our national community and in the course of developing new information and understanding about sociology and psychology.

Only 128 years ago, the Supreme Court asked:

> The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

Dred Scott v. Sandford, 60 U.S. (19 How) 393, 403 (1856).

The Court sought justification for its negative answer by finding that the founding fathers did not intend to recognize slaves or their descendants as citizens. Chief Justice Taney made the following observation about the status of Negroes at the time of adoption of the Declaration of Independence and the Constitution:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they

had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States.

Id. at 407-8.

The *Dred Scott* opinion was, of course, reversed by the adoption of the Thirteenth and Fourteenth Amendments to the United States Constitution after the Civil War. Yet, the power of the continuing public perception of in-

feriority of Blacks was reflected in the adoption of the "separate but equal doctrine" in *Plessy v. Ferguson*, 163 U.S. 537 (1896). There, the majority of the Supreme Court approved a Louisiana statute requiring separation of white and "colored" races in railroad coaches with the following language:

> The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

Id. at 544.

The force of that assumption of inferiority is reflected in these words from the dissenting opinion of Justice Harlan:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

Id. at 559, 561.

In *Brown v. Board of Education*, 347 U.S. 483 (1954), the Supreme Court took notice of the historical experience of the Negro in America, and it was that history of racial disadvantage in our social, economic and political life which formed the predicate for the conclusion that racially-segregated schools are inherently unequal. In overruling *Plessy v. Ferguson*, the Supreme Court made a fundamental change in the interpretation and application of the equal protection clause of the Fourteenth Amendment. Departing from its past practice of deciding such issues by discoursing on political theory, the Court considered evidence of the actual effects of racial separation well beyond the record before it, using secondary sources of information.[2] Thus, in affirming the Kansas case finding that segregation has a detrimental effect upon Negro children, the Court said:

> Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.

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[2] The Court's use of matters of common knowledge concerning broad societal patterns was defended in Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960). Professor Black wrote:

> The case seems so onesided that it is hard to make out what is being protested against when it is asked, rhetorically, how the Court can possibly advise itself of the real character of the segregation system. It seems that what is being said is that, while no actual doubt exists as to what segregation is for and what kind of societal pattern it supports and implements, there is no ritually sanctioned way in which the Court, as a Court, can permissibly learn what is obvious to everybody else and to the Justices as individuals. But surely, confronted with such a problem, legal acumen has only one proper task—that of developing ways to make it permissible for the Court to use what it knows; any other counsel is of despair. And, equally surely, the fact that the Court has assumed as true a matter of common knowledge in regard to broad societal patterns, is (to say the very least) pretty far down the list of things to protest against.

Id. at 427-428.

Brown, 347 U.S. at 494 (footnote omitted). The footnote for that statement referred to several publications, including E.F. Frazier, *The Negro in the United States*, 674-681 (1949). The following passages appear in that work:

> The theory of separate but equal educational and other facilities has never worked out in practice. Separate education for Negroes has always meant inferior schools and inferior teaching personnel for Negro children. Inferior schools have caused a high rate of illiteracy to continue among Negroes since Emancipation. The resulting mental isolation of Negroes which continued a half century was only partially broken down by the mass migrations of Negroes to northern cities during and following World War I. Because of the discriminations in regard to employment the Negro has been kept in the lowest paid and unskilled occupations, and thus there has been no premium placed upon exceptional skill and talent among Negroes.
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> . . . Consequently, the Negro has never been permitted to achieve the full stature of a man through competition with whites. Many of his leaders have owed their pre-eminence to the fact that they have played the role of mediators in a pattern of race relations based upon the economic dependence and social subordination of the Negro. The dominant white interests have singled out mediocre Negroes for the role of "great Negroes," while Negroes of superior mental endowment and courage have been crushed as irresponsible radicals. Thus a factual and objective basis for the charge that the Negro is a "child" race has been provided in the whole system of racial discrimination. It is no wonder that since the Negro has been treated and regarded as a "child" race, whites have not taken him seriously. In fact, as the result of the system of discrimination, the Negro has not been permitted to play a serious role in the economic and social life of the nation.

Id. at 674-677.

Another of the publications cited in that footnote is G. Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (1944) which includes the following observations:

> But when segregation and discrimination are the outcome of individual action, the second main norm of the American Creed, namely, *liberty*, can be invoked in their defense. It must be left to the individual white man's own discretion whether or not he wants to receive Negroes in his home, shake hands with them, and eat with them. *If upheld solely by individual choice*, social segregation manifested by *all* white people in an American community can be—and is—defended by the norm of personal liberty. When, however, legal, economic, or social sanctions are applied to enforce conformity from *other* whites, and when Negroes are made to adjust their behavior in response to *organized* white demands, this violates the norm of personal liberty. In the national ideology, the point where approved liberty changes into disapproved restriction on liberty is left somewhat uncertain. The old liberal formula that the individual shall be left free to follow the dictates of his own will so long as he does not substantially hamper the liberty of other persons does not solve the problem, because it is not definite enough. As remarked in an earlier chapter, the American Creed is in a process of change from "rugged individualism." It is giving increasing weight to "the other fellow's" liberty, and thus narrowing the scope of the actions which become condoned by the individualistic liberty formula. (emphasis in original)
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> To apply the American value premises in this condition of internal conflict within the concept of liberty itself—which is only another aspect of its external conflict with the concept of equality—stress has to be laid on the actual amount of discrimination. When there is substantial discrimination present, liberty for the white person has to be overruled by equality. *To discern discrimination we must take into account the indirect*

> *effects of segregation in terms of cultural isolation, political and legal disabilities, and economic disadvantages, which are often much more important than the direct social discrimination.* (emphasis added)

Id. at 573-574.

The impact of the *Brown* decision was felt far beyond the schools. In a firm and consistent line of decisions, the ruling was extended to prohibit public segregation of other public facilities, such as transportation systems, *Gayle v. Browder*, 352 U.S. 903 (1956); parks and playgrounds, *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958), *Wright v. Georgia*, 373 U.S. 284 (1963), *Watson v. Memphis*, 373 U.S. 526 (1963); golf courses, *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); beaches and bath houses, *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955); auditoriums, *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954); courthouses, *Johnson v. Virginia*, 373 U.S. 61 (1963); parking garages, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); and airports, *Turner v. City of Memphis*, 369 U.S. 350 (1962). *See also, Loving v. Virginia*, 388 U.S. 1 (1966) (striking down state miscegenation laws.) "The principles announced in [*Brown*] . . . according to the command of the Constitution, are indispensible for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth." *Cooper v. Aaron*, 358 U.S. 1, 19-20 (1958).

In this very civil action, the Supreme Court formally recognized that Hispanos suffered from much of the same economic and cultural deprivations. *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 197 (1973). Indeed, the Court made the following specific determination with respect to the Denver, Colorado community at page 198 of the opinion:

> [T]hough of different origins, Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of "segregated" schools.

Perhaps much of the confusion, controversy and continuing litigation which has occurred nationally in the 31 years since *Brown*, and locally in the 12 years since *Keyes*, have been caused by a failure to appreciate the Court's connection of school policy with national history. It is not that the schools have been singled out as experimental vehicles to redress all of the past injustice and inequity suffered by racial minorities; it is that the courts have prohibited school officials from perpetuating the disadvantages caused by past practices of the larger society.

The reason that racial separation in public schools is a denial of equal protection of the laws in contravention of the restraint of the Fourteenth Amendment is that in 1954, and 1973, and still today, the Anglo, the Black and the Hispano continue to occupy different positions in our pluralistic nation. To find segregative intent, it is not necessary to find that an act or omission resulted from bad purpose or evil motive; it is sufficient if it reflects a disparate perception of relative worth. The attitude of neutrality characterized by the newly popular phrase "color blindness" avoids the obligation to recognize the continuing effects of past prejudices, practices and passions.

Stripped of all legalese, the present state of the law is that whatever other disadvantages may be visited upon an individual in the accident of birth, the Constitution prohibits any governmental use of race, color or ethnicity to impose an impediment to the seeking of benefits of public educational services.

The scientific community continues to find significant evidence to suggest that each human being may be predestined by an individual genetic code in very significant ways. These individual differences may be influences on mental and physical development, behavioral adjustment and risk factors for disease, all independently of race, sex or other group characteristics. These findings of physical science compel a reading of the "self-evident truth" that "all men are created equal," to mean that the government must act "as if" each person has equal potential for achievement. No school policy and no court order can assure any particular level of success in public schools any more than in any other aspect of life. Individual students will flunk, become disciplinary problems, drop out or otherwise fail to meet expectations for reasons wholly unrelated to race, ethnicity, and environment. The true causes for those results are properly matters of interest to educators, sociologists, psychologists, physicians and other disciplines. Neither cause nor effect can be used in applying constitutional principles.

Stated as a prohibitive, what the Constitution requires is that the government must not itself act as an agent of predestination in association with any immutable characteristics of birth. There is no scientific evidence to suggest that such group characteristics as race or ethnicity are limiting factors on any individual. To the extent that race is a disadvantage, it is the result of prejudices, attitudes and historical deprivation. Data suggesting different achievement levels according to race are relevant only as circumstantial evidence of the effects of discriminatory attitudes and practices. To escape the intangible effects of any stereotyping or latent bias, government officials must avoid the use of racial identifications in acting on public issues. That is true whether government acts to regulate and restrict conduct or to provide services such as educational opportunity.

THE DEFENDANTS' POSITION

The defendants' carefully constructed argument in support of the subject motion has the appeal of logic. Stated succinctly at page 2 of the defendants' post-trial brief, the contention is this:

> Once a school district has complied with a constitutionally-acceptable court-ordered remedy that is designed to desegregate the system in the full sense, and has maintained substantial compliance with that remedy for a sustained period of time, the school district is entitled to be declared unitary unless there have been intervening acts of discrimination.

The prime thesis of this argument is that this court's 1974 Final Judgment and Decree, as modified in 1976, was a complete remedy for all of the constitutional violations found in this case. The validity of that thesis is critical to the contention that by complying with the requirements of that Decree the District established a unitary school system.

What was to be remedied? Simply put, what was required was the reversal and eradication of the effects of a policy of geographical containment of Black people in an area of northeast Denver. For almost ten years the members of the Board of Education tried to keep Black families out of the White residential neighborhoods east of Colorado Boulevard by manipulating attendance areas, designing new school construction, installing mobile classroom units, and steadfastly refusing to relieve overcrowding of Black schools. This policy was at work in 1960 when Barrett School was constructed as a relatively small school building with an attendance zone entirely in the Black community, even though a White school located only a few blocks away was operating at 20% over capacity. It was apparent that Barrett, Stedman, Park Hill, Philips

and Hallett Elementary Schools were designed for attendance of Black pupils. Mobile units and additional classroom construction were used to expand the capacity of those schools while preserving the Anglo character of the schools to the east of them. The continued use of that segregative policy was clearly the will of the electorate. When a slim majority of the Board adopted resolutions in 1969 to attempt to alleviate the segregative effects of this policy by reassigning some students and transporting them out of racially separated neighborhoods, the people of Denver overwhelmingly repudiated that action by defeating two of the most articulate Board members and replacing them with new members who vowed to reverse those resolutions. When those promises were kept, the plaintiffs came to this court, seeking a preliminary injunction in 1969.

Through all of the intervening years, the court and the parties have struggled with two elusive and intractable questions. How did that policy of containment in northeast Denver affect the Denver Public School System as a whole? What is required to remove those effects? Those questions have caused this case to be considered by two judges in this court, the judges of the Tenth Circuit Court of Appeals, and the Justices of the Supreme Court of the United States. A third question, which has been lurking in the shadows, now comes to the spotlight. What must be done to protect against future resegregation and a return to a dual system?

It is the law of this case that the 1974 Final Judgment and Decree was not an adequate remedy for segregated school assignments. The Tenth Circuit Court of Appeals in *Keyes v. School Dist. No. 1, Denver, Colo.*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976), faulted the court plan for pupil assignment because it used only part-time pairing. The appellate court said:

> We hold that the part-time pairing component of the court's remedy for desegregation of elementary schools *is not constitutionally acceptable as a basic and permanent premise for desegregation but deem that practicality negates the necessity of invalidating in toto this aspect of the trial court's judgment at this time.* We read this innovation as recognized by the trial court as an adjunct to be tolerated only as such under the temporary conditions of the present and as a step toward total integration.
>
> Although the district court's remedial discretion is broad, it is necessarily bounded by the constitutional requirement that the court make "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. B'd of School Commissioners of Mobile County*, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577. In examining the record and the district court's opinion, we find no insurmountable practical impediment to full-time desegregation. Indeed both the court and its consultant Dr. Finger were of the view that part-time classroom pairing would easily convert to a full-time program. The court's part-time plan offers some of the most severely segregated schools in the district only part-time desegregation; of the eighteen predominantly minority schools in the part-time program, thirteen have projected enrollments of less than ten percent Anglo pupils. Under the circumstances a partial solution for these schools is not enough.

Id. at 477-478 (emphasis added) (footnote omitted).

The Tenth Circuit also faulted the district court's plan for leaving Boulevard, Cheltenham, Del Pueblo, Elyria and Garden Place as segregated Hispano schools, and reversed the conclusion that remedial education was an acceptable substitute for reassignment of students. With respect to those schools, the Court remanded with the following instruction:

> We therefore remand this portion of the case for a determination whether the continued segregation of students at the five mentioned schools may be justified on grounds other than the institution and development of bilingual-bicultural programs at the schools. "The district judge . . . should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools." *Swann, supra,* 402 U.S. at 26, 91 S.Ct. at 1281.

Id. at 480.

The establishment of the East-Manual complex was also reversed. Finally, the appellate court affirmed the district court's requirements with respect to the desegregation of faculty and staff, using the following language:

> During the 1973-74 school year, disproportionate numbers of the Denver school system's minority teachers were assigned to schools with high concentrations of minority students. Despite the District's institution of a minority recruitment program in recent years, the percentage of minority faculty members in the system has not increased appreciably. Of the view that faculty desegregation is essential to the process of school desegregation, *the district court ordered the District to assign its personnel so that, in each school, the ratio of minority teachers and staff to Anglo teachers and staff shall not be less than 50% of the ratio of minority to Anglo staff in the entire system.* The School Board does not dispute the propriety of this component of the court's remedy.
>
> . . . .
>
> Contrary to the School Board, we believe that these measures to ensure faculty desegregation were properly part of the court's order. *Faculty and staff desegregation is an "important aspect of the basic task of achieving a public school system wholly free from racial discrimination."* (citations omitted) . . .

> We believe that the court's faculty and staff desegregation orders were proper and we affirm.

Id. at 484 (footnotes omitted) (emphasis added).

The March 26, 1976 Order, entered by Judge Doyle, approved the use of an agreed plan in response to the mandate of the Court of Appeals. It is clear, however, that future change was expected because the court said:

> The School Board, in Resolution 1897, has requested that no changes be made in student school assignments for three years; this in the interest of continuity and stability. In the court's view the objective is good with the exception that some flexibility should be retained so as to make adjustments for substantial population changes.

Additionally, the issue of bilingual education was left open. At that time, it was expected that a stipulated proposal for the modification of the bilingual program would be immediately forthcoming.[3]

This court honored the request to avoid altering the student assignment plan for a period of three years, and the only changes made were those requested by the District for the limited circumstances of particular situations. To plan for declining pupil enrollment and consequent excess plant capacity, in 1977 the Board of Education appointed an advisory committee of citizens to study the utilization of school buildings and to recommend criteria for closures and consolidations. That committee made a report which was accepted by the Board in April, 1978. The committee did not contemplate action to make changes before September, 1981. The Board changed that time to September,

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[3] In fact these issues were litigated at length in May, 1982, resulting in the Memorandum Opinion and Order on Language Issues which appears as *Keyes v. School Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503 (D.Colo. 1983).

1980. After the Community Education Council, a court-appointed monitoring group, expressed concerns that imbalances in racial composition and crowded conditions had developed in some schools, hearings were held in this court in January, 1979 to consider the status of those school.

At that time the court was informed that the Board of Education had directed the filing of a report by an Administration Task Force on school closings and school assignments in March, 1979. Accordingly, the court set May 1, 1979 as the date for the filing of a comprehensive student assignment plan, and set June 1, 1979 as a date to report on the status of compliance with orders requiring affirmative action in the hiring, assignment and in-service training of teachers, administrators and staff. A new plan, adopted in Resolution No. 2060, met opposition from the plaintiffs/intervenors and, accordingly, a further hearing was held on July 20, 1979 on the motion of the defendant School District No. 1 to implement those portions of Resolution No. 2060 dealing with school closings and pupil assignments for the school year 1979-1980.

No one suggested then that this court did not have jurisdiction to modify the 1976 pupil assignment plan. Moreover, while the Board wanted to close four schools, it failed to take any action to consider the objections and concerns which had been expressed at the hearing. The Board members simply did not meet in legislative session, and left it to this court to make the necessary changes in pupil assignments. That dereliction of the Board's duty permitted its members to avoid criticism from the community, and positioned them to continue their popular protest of judicial intervention into local self-governance.

This court addressed the question of the extent of desegregation which existed in 1979 in the Memorandum

Opinion and Order which appears as *Keyes v. School Dist. No. 1, Denver, Colo.*, 474 F. Supp. 1265 (D.Colo. 1979). The court noted that the Board of Education and administration recognized that Gilpin, Fairview and Greenlee Elementary Schools had not met the desegregation guidelines, and said:

> What is now needed is recognition by the Board of Education, school administration, and staff that they have not yet established a unitary, non-racial school system in Denver, Colorado and that they have a legal obligation to demonstrate to this court that they are taking appropriate action to reach that result.

Id. at 1272.

This court then adopted the plaintiffs/intervenors' proposal for the reassignment of students from the closed Ellsworth Elementary School; made its own reassignment of students from the closed Emerson Elementary School; made assignments to the new McKinley-Thatcher School; rejected the Board's proposed removal of Ashley mobile units; approved the reassignment of pupils from closed Elyria Elementary School; adjusted the attendance zone of Belmont School; adjusted the Fairview-Greenlee-Traylor grouping by pairing Fairview and Rosedale; and authorized the establishment of an Oakland-McGlone pair. There was no adjustment for Gilpin and Mitchell, which remained segregated schools.

There was no appeal from the 1979 Order. To the contrary, the court's view that unitary status had not been achieved appeared to have been accepted when the Board appointed an Ad Hoc Committee in May, 1980 to create a definition of a unitary system and to develop guidelines for its identification. That action was taken by Resolution No. 2110, which included the charge that the Ad Hoc Committee should also design a new student assignment

plan for pupil assignments to elementary and middle schools based on demographic data which had been presented to the Board by the long-range planning committee in March, 1980.

The long-range planning committee had been created by Resolution No. 2079 in August, 1979. Its report recommended developing a middle school program, eliminating junior high schools and establishing four-year senior high schools. That educational change required reassignment of all ninth grade pupils, thereby disrupting the existing attendance zones. Accordingly, the work of both committees converged.

The Ad Hoc Committee's pupil assignment proposal was the subject of detailed study by the Board of Education during the summer of 1981. Despite a division on the issue of "busing," the Board developed a student assignment plan. It was submitted to this court along with an alternative open enrollment plan approved by a divided vote and without staff study. In the "Submission of Plans" filed October 30, 1981, the District said:

> PURSUANT to the action of the Board of Education, School District No. 1, . . . submits the attached proposals entitled, *Community Neighborhood School Open Enrollment Concept, and The Denver Public Schools: A Unitary System*, to the Court for its consideration.
>
> At the time the Board directed the submission of these proposals, the following motion was adopted:
>
> > That the Board of Education submit to the United States District Court, for its consideration, the proposals entitled, *Community Neighborhood School Open Enrollment Concept and The Denver Public Schools: A Unitary System*, as developed by the Board of Education with the following recommendations:

A. The *Community Neighborhood School Open Enrollment Concept* plan is the desirable plan.

B. If the Court insists on the maintenance of pupil assignments which are based upon the racial and ethnic identification of students, the Board submits the alternate plan for the Court's consideration provided, however, that in those instances where schools are paired, that the Court authorize the discontinuance of the pairing and return of the paired schools to neighborhood schools at such time as the racial and ethnic percentages within the paired schools fall within a range of 20-63% Anglo.

* * *

That following submission of the plans, that the Court determine that with the implementation of either plan, that the School District is a unitary school system and establish a specific timetable for the relinquishment of the Court's jurisdiction.

Upon this court's refusal to choose between two such dramatically divergent approaches, the Board submitted the open enrollment concept in what came to be called the "Total Access Plan." It was the subject of a two-week evidentiary hearing in March, 1982, which resulted in the court's rejection of that plan upon the finding that it was lacking in "concern, commitment and capacity." The Board then submitted the "Consensus Plan" which consisted of the October 30, 1981 student assignment plan with two magnet schools as educational enhancements which had been suggested in the Total Access Plan. The interim nature of the Consensus Plan is identified in the following language from the introduction to it:

INTRODUCTION

In response to the order of the Federal District Court of March 15, 1982, and in accordance with the Denver Board of Education motion of March 18, 1982, a pupil assignment plan is being submitted for the achievement of a unitary, non-racial system of public education.

This Pupil Assignment Plan combines the Consensus Plan of October 1981 with certain educational enhancements of the Total Access Plan of December 1981. It reflects the determination of the Board of Education to provide a quality educational experience for all children which will:

- create as many walk-in schools as possible
- remove as many pupils as possible from required busing
- bring stability to pupil assignment areas
- continue the effort to realize and maintain a unitary school system
- remain sensitive to the changing needs of a diverse, urban pupil population
- be in compliance with the United States District Court Order.

The Pupil Assignment Plan includes the mandatory assignment of pupils, the closing of nine schools, and the implementation of the middle school program now in preparation.

The preparation of the Consensus Plan included extensive community involvement, intensive study by an Ad Hoc Committee of the Board of Education, and direct personal involvement of all members of the Board of Education in the final decision making process, resulting in a comprehensive plan for adjusting existing school attendance boundaries.

Two educational enhancements of the Pupil Assignment Plan are the Fundamental School to be con-

ducted at Knight Elementary School and a self-supporting extended day school at Gilpin Elementary School. The ethnic ratio in each of these schools shall reflect the pupil population in the District in keeping with Court determined pupil ethnic assignment ratios. Knight Fundamental School will be open to all pupils in the District; the Gilpin School population will include pupils in the home attendance area and pupils from the entire District who are enrolled in the extended day program.

Upon Court approval of the Pupil Assignment Plan, staff will begin preparations for further educational enhancements for possible addition each year as an ongoing feature of District educational planning policy.

In addition, the Plan includes three significant Denver Public Schools initiatives, components of the Total Access Plan, which are designed to enhance educational opportunity:

- District and School Accountability Councils
- Guidelines for Pupil Placement
- Standards for School Effectiveness.

The presently authorized District and School Accountability Councils are used in the Plan as monitors of educational quality and equity, achievement of goals, and equitable disciplinary policies and procedures.

Guidelines for Inschool Pupil Placement were approved by the Board of Education in February 1982. These guidelines ensure that pupils will participate in experiences that are relevant to the cultural, ethnic, and racial diversity of the school and that grouping is based on a fair assessment of pupils' skills, interests, needs, and aptitudes.

The "Standards for School Effectiveness" is based on extensive research which has identified characteristics of effective schools. The "Standards" includes specific instruments for assessing these characteristics

> and means for maintaining effective practices and improving areas of weakness in each school.
>
> Finally, the Board of Education submits for the Court's approval plans for building a needed elementary school facility in Montbello and a replacement facility in the Columbian area.
>
> The basic instructional programs and educational enhancements presently in place in the Denver Public Schools also are described and included in this report.

In approving the Consensus Plan, this court emphasized that the approval was for an interim solution, recognizing that the plaintiffs/intervenors had made objections to portions of it with an evidentiary showing that it would probably produce resegregative effects in some elementary schools. The court's reservations were expressed in the following language:

> In this case, I am now accepting the modified consensus plan for the single school year of 1982-83. I do so with considerable reservation because I am not convinced that the incumbent school Board has shown a commitment to the creation of a unitary school system which will have adequate capacity for the delivery of educational services without racial disadvantages.
>
> The consensus plan is an expedient which will accommodate the educational policy decision to move to middle schools and which will attenuate the divisive effects from the factionalism found in the present board of education. The positive element in this plan is that it reflects a consensus of the views of the board members. Acceptance of this plan for a single school year is not to be construed as an abdication of this court's authority and responsibility to compel compliance with the desegregation mandate.

Keyes v. School Dist. No. 1, Denver, Colo., 540 F. Supp. 399, 403 (D. Colo. 1982).

Along with that reservation, the court attempted to set some direction for the anticipated future planning by adopting the Ad Hoc Committee's definition of a unitary school system as follows:

> A unitary school system is one in which all of the students have equal access to the opportunity for education, with the publicly provided educational resources distributed equitably, and with the expectation that all students can acquire a community defined level of knowledge and skills consistent with their individual efforts and abilities. It provides a chance to develop fully each individual's potentials, without being restricted by an identification with any racial or ethnic groups.

Id. at 403-404.

This court also expressed a favorable view of the Ad Hoc Committee's guidelines as criteria for identifying a unitary system in operation. Believing that progress toward the defined goal of unity required both effective monitoring and expert advice from appropriate academic disciplines, and after consultation with counsel for all parties, the court appointed the Compliance Assistance Panel, composed of three outstanding scholars who had appeared at various times as expert witnesses in this case.

The court's charge to that committee was to perform the following duties:

> 1. To meet with the Board of Education, any committee or administrative staff designated by the Board, and with counsel for the parties herein, for the purpose of preparing a timetable for the preparation and submission of a pupil assignment plan for the school year 1983-84.
>
> 2. To meet with the Board of Education, any committee or administrative staff designated by the Board, and with counsel for the parties herein, for

the purpose of preparing appropriate guidelines for pupil assignment plans for subsequent years, including long-range planning.

3. To prepare and submit a set of criteria for the identification of a Unitary School System, using the Unitary School System Plan Final Report of the Ad Hoc Committee, presented June 5, 1981 (Defendant's Exhibit D-2) as an initial working document.

4. To develop a plan to review, analyze and report on the present affirmative action plan for faculty and staff, including in-service training, and contingency plans for recruitment and reduction of faculty and staff, according to needs, on a non-discriminatory basis, consistent with existing collective bargaining contracts.

5. To prepare a plan for review, analysis and reporting on any racially discriminatory effects from present practices in the measurement of educational achievement and student discipline.

6. To develop recommendations for establishing criteria for school closings and new construction.

7. To develop a recommendation for constraints to be considered in proposals for the establishment of additional magnet schools and any other proposals for enhancement of educational opportunities to ensure racial and ethnic equality in the availability of such services.

8. To develop recommendations for interaction with local, state and national governmental agencies whose decisions concerning housing, zoning, transportation and other governmental services may influence and affect school policies and programs, including the demographics of the district.

9. To develop a plan for the collection and collation of the views of identifiable organizations and groups concerned with equal educational opportunity.

10. To develop a plan for the assessment of the effectiveness of the monitoring and self-evaluation methods adopted by the School District.

It now appears from the testimony of Board members and administrative staff at the hearing on the subject motion that the court's appointees were seen as interlopers, and that this court was considered to be intervening in the operation of the school system far beyond any appropriate role. It is also now apparent that contrary to what was being represented to the court and to the community, the Board had adopted a secret agenda to hire a mathematician experienced in the display of statistical data in desegregation cases and a new lawyer, who had successfully represented another school district in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), to develop the display presented with the effort to terminate this litigation. In consequence, the spirit of cooperation which had seemed to exist among counsel in this case was replaced by the old adversarial confrontation necessary for the proper presentation of the very different views which are now before this court.

In approving submission of the subject motion, the Board of Education altered its position in this litigation. All of the members of the Board adopting Resolution No. 2228 have testified to their individual intentions in taking that action. The common theme was the expression of a shared concern that continuation under court control stigmatizes the Denver school system with consequent adverse effects on the schools and the community as a whole. There is a perception that families have fled to private schools and to the suburbs to avoid forced busing, and a belief that this court's involvement creates a climate of coercion which prevents the development of positive and innovative educational programs.

This court does not discount the reality of the declining enrollment and the possibility of a causal relationship with court-ordered reassignments as suggested by some of the data in the evidence. It is also unquestioned that people who devote their time and energy to the extremely difficult task of serving on the Board of Education, without remuneration, are citizens with outstanding qualities of commitment to the public welfare and dedication to the best interests of future generations. They are chosen from the community to express and implement the will of the electorate, and it must be assumed that the subject motion was the sense of the majority of the voters in District No. 1. Yet, School Board members, as all other elected representatives of the people, must also hear and heed the commands of the Constitution which often conflict with majoritarian opinion. The courts have the duty to articulate and apply those constitutional limitations in particular circumstances.

HAS A UNITARY SCHOOL SYSTEM BEEN ESTABLISHED IN DENVER?

In answering affirmatively, the defendants set forth a simple syllogism. Major premise: The 1974 Decree, as modified in 1976, called for a complete and adequate remedy for the segregative effects of Denver's dual system. Minor premise: The District has complied with all of the requirements of the Decree since 1976. Conclusion: Denver has achieved desegregation and is now a unitary district.

As already discussed, the Tenth Circuit Court of Appeals determined the 1974 Final Decree to be inadequate. Therefore, the question to be asked with respect to the major premise in this argument is whether the 1976 modifications, coupled with the remaining portions of the 1974

Decree, constituted a sufficient plan to desegregate the entire Denver Public School System "root and branch."[4] As counsel for the District recognize, an adequate desegregation plan must include more than the assignment of pupils to avoid the racial identification of schools. It must also address the policies and practices with respect to faculty, staff, transportation, extracurricular activities and facilities. *Green v. County School Board*, 391 U.S. 430 (1968). Additionally, an adequate remedy must ensure against any future use of school construction and abandonment to serve, perpetuate, or re-establish a dual system. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

As noted above, the 1976 Order was simply the approval of a stipulated plan submitted in a spirit of compromise and, by Resolution No. 1897, the Board indicated clearly the expectation that changes would be required in future years. That was the reason the Board requested a three-year moratorium. Nothing in the 1974 Order, and nothing in the 1976 agreed plan, established any mechanism to avoid future segregation in making school construction and school abandonment decisions. At this point, it is well to return to the exact language of the Supreme Court in *Swann*:

> In devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system. *When necessary, district courts should retain jurisdiction to assure that these responsibilities are carried out.*

402 U.S. at 21 (emphasis added).

[4] The "root and branch" requirement was established in *Green v. County School Board*, 391 U.S. 430, 438 (1968), and was specifically applied to Denver in *Keyes*, 413 U.S. at 213.

Plainly, the court and all parties were aware that the remedy phase of this case did not end with the signing off on the 1976 agreed modifications and intended the retention of jurisdiction for the indefinite future. The adequacy of any desegregation plan is, of course, measured not by its intentions but by its effectiveness. *See Dayton Board of Education v. Brinkman*, 443 U.S. 526, 538 (1979) (*Dayton II*). Thus, determination of the adequacy of the 1974 plan, as modified in 1976, is directly related not only to the degree of compliance by the defendant District in the intervening years, but also to whether the implementation of the plan achieved the results intended. Therefore, the major premise and minor premise may be addressed together in reviewing the subsequent events.

What then was accomplished between 1976 and 1980? Mitchell, Gilpin and Fairview Schools fell below the then applicable guideline of a minimum 34% Anglo enrollment in the fall of 1976. In 1979, Mitchell had a 26.8% Anglo enrollment, and Gilpin had fallen to 19.6%. The need to close some school facilities became apparent as early as the 1976-1977 school year. This court's Order set May 1, 1979 as the date for the Board to file a comprehensive student assignment plan, and June 1, 1979 as the reporting date on the status of other aspects of the plan, including affirmative action and in-service training. As earlier noted, a plan was submitted by Resolution No. 2060, and the plaintiffs/intervenors filed objections with alternative proposals. In the absence of further Board action to meet those objections and to consider the alternative proposals, this court was compelled to make the reassignment of pupils from the closed schools and to attempt to alter the racial isolation of Fairview. The court did not act to remedy the racial identification of Gilpin and Mitchell Schools, and it was partially for this reason that the court expressly recognized that the 1979 order

was interim action required to meet an "existent emergency." *Keyes*, 474 F. Supp. at 1271. The court also, as earlier noted, made an explicit finding of fact and conclusion of law that the School District had not achieved unitary status, and there was no appeal from that determination.

The adoption of the Consensus Plan was explicitly identified as another interim expedient, made necessary by the Board's abrupt change of position in submitting the Total Access Plan, implicitly repudiating the work of its own Ad Hoc Committee. *Keyes*, 540 F. Supp. at 404. During the 1982 hearings, the plaintiffs addressed very specific objections to features of the Consensus Plan and predicted resegregative effects from its implementation. It is important to recognize that the "consensus" of the "Consensus Plan" referred to a 6-1 consensus of the School Board members, and did not involve any agreement by the plaintiffs or the intervenors. It is also clear that the basis for the formation of the Board consensus was an effort to reduce "forced busing" by attempting to expand walk-in attendance areas. The proposal was premised on a hope that there would a discernible movement toward natural integration of these attendance zones by changes in housing patterns.

The evidence now before the court shows that the plaintiffs' objections and the court's concerns about the Consensus Plan were well founded. Barrett and Harrington have become racially identifiable schools, with their respective Anglo populations falling from 43.3% and 25.3% in 1981 to 18% and 15% in 1983. Mitchell fell from 22.5% to 12% Anglo. The plaintiffs/intervenors argue that the resegregation of these schools as a result of the adoption of the Consensus Plan establishes proof of official segregative action which justifies remedial action by this court.

The defendants counter with the contention that the loss of Anglo enrollment at these schools is additional evidence of the phenomenon of white flight, and that the existence of three racially identifiable elementary schools does not indicate a return to a dual system. Indeed, a basic dispute between the parties in this case is the manner in which statistics should be used to measure desegregation, as will be discussed later in this opinion.

It is not necessary to deal with the contention that the Consensus Plan showed segregative intent. The conclusion of this court is that it has had and continues to have jurisdiction in this case, and no new intentional acts are required to justify the exercise of that jurisdiction.

Over the last nine years, the Denver Public School System has become smaller, both in numbers of students and schools. In 1976-77, the school system contained 61,680 students in 119 schools. In 1983-84, the Denver Public School system contained 51,159 students in 107 schools. The ethnicity of the pupil population has also changed. In 1976-77, the District was 49.33% Anglo, 28.23% Hispano and 20.30% Black. In 1983-84, the District was 39.18% Anglo, 33.33% Hispano and 22.72% Black.

There are now three levels of schools in the system, elementary schools, middle schools (grades 7-8), and high schools (grades 9-12). In 1983-84, 80 schools, or nearly 75% of the schools in the school system, were elementary schools. The number of schools and their sizes are significantly different at the three levels. Maintenance of stable ethnic distributions of students is more difficult in the elementary schools than in either the middle or senior high schools, because the same absolute change in the number of students in an elementary school has a greater relative effect on ethnic percentages in the school. Typical-

ly, elementary school attendance zones are smaller and more sensitive to local demographic changes. The larger the school, the more elastic is its response to small changes in school populations.

The defendants have presented a vast array of statistical data and expert opinion to support the claim that since 1976, the City and County of Denver and the Denver Public School System have undergone demographic changes which have had a "striking" effect on student attendance patterns. The District urges that "extensive movement" of population within Denver and "a steady and large decline in enrollment, almost all of which represented a loss of Anglo students" are reasons for the development of racial imbalance in certain schools. In making that argument, the defendants place heavy emphasis on an exhibit derived from a question in the 1980 long-form census questionnaire (which asked where people lived five years ago) to suggest that there was a large migration of Anglo families with school-age children from Denver out to the suburbs between 1975 and 1980, and that there was no significant converse movement.

This presentation is flawed by the omission of information about persons who lived in Denver in 1975 and moved away from the entire metropolitan area. The exhibit titled "Patterns of Demographic Mobility and Family Income Within Denver SMSA" presents data in three groups. Group A is titled "Denver Residents," group B is "Suburban Residents," and group C is "In-Migrants." The universe from which the percentages are computed for groups A and B is not complete. Group A only makes sense as a description of what has happened to the set of people who were Denver residents in 1975. It includes those 1980 Denver residents who answered that they did not move or moved only within Denver. It also includes those

residents in the Denver suburbs in 1980 who responded that they lived in Denver 5 years earlier. However, Group A does not include the persons who did live in Denver in 1975 but who moved away from the Denver SMSA (Standard Metropolitan Statistical Area) before 1980. The calculations for Group B contain the same omission. Without knowing how many households moved away from the Denver metropolitan area since 1975, accurate percentages cannot be computed, and the data are not very helpful in the present analysis. This court is not persuaded that demographic change is the reason for the development of racial imbalance in the schools.

HAS DISTRICT NO. 1 COMPLIED WITH THE COURT ORDERS?

Student Assignments

The District did implement the pupil assignment plan accepted by the 1976 Decree in the school year 1976-1977. Transportation was provided and, on the whole, pupils were required to attend the designated schools. Accordingly, during that particular school year, the Denver school system can be considered desegregated with respect to pupil assignments. That, of course, is but one of the elements in a unitary system.

Faculty Assignments

The plaintiffs/intervenors contend that there has never been compliance with the faculty assignment provision of the 1974 Decree. On this point, the evidentiary hearing on the subject motion presented a question of which this court was not previously aware. Paragraph 19A of the 1974 Decree imposed the following requirement with respect to faculty assignments:

> Effective not later than the beginning of the 1974-75 school year, the principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial or ethnic composition of a staff indicate that a school is intended for minority students or Anglo students. The District shall assign the staff described above so that the ratio of minority to Anglo teachers and other staff in each school shall be not less than 50% of the ratio of such teachers and other staff to the teachers and other staff, respectively, in the entire school system. Because of the present small number of Chicano teachers in the system, complete achievement of the required ratios as to Chicano teachers is not required immediately, but should be achieved as soon as possible.

The parties have differing interpretations of that language. The District interprets paragraph 19A to require that the ratio of Black teachers to the total of Black, Hispano and Anglo teachers in each school be compared with the district-wide ratio of Black teachers to the district-wide total of Black, Hispano and Anglo teachers, and that similar but separate ratios also should be computed for Hispano teachers.

Further, the District has determined that in applying these ratios for a particular school, if the required number of Black or Hispano teachers is some integer number plus a fraction which is less than one-half, then a school is in compliance with the decree if its faculty includes only the whole number of such teachers. Any fractional part less than one-half has been ignored. For example, in 1981-82, the district ratio of Black classroom teachers to the total of Black, Hispano and Anglo classroom teachers was 0.1350, and one-half of this number is 0.0675. Carson Elementary School had 25 Black, Hispano and Anglo teachers. To have a Black faculty percentage greater than 50% of the dis-

trict-wide ratio, Carson would require 0.0675 x 25, or 1.69 Black teachers. In 1981-82, Carson had 3 Black teachers and satisfied paragraph 19A as interpreted by the District. However, in 1981-82, Johnson elementary school had 22 Black, Hispano and Anglo teachers and would need 0.0675 x 22, or 1.485 Black teachers to satisfy the test. Johnson had 1 Black teacher. Because the remaining fraction was less than 0.5, the District determined the school to be in compliance.

Another important aspect of the District's approach is the use of the prior year's district-wide teachers' ratios to determine the degree of compliance for a current year because it is the District's practice to assign faculty members in the spring for the following fall. A possible result is that the district-wide ratios used are less than the actual ratios of minority to total teachers in the district for the following year if, in fact, the proportion of minority teachers increases from year to year, as a result of the affirmative action hiring program. That has, indeed, occurred. The District defends this as the proper way to determine compliance because it is the only basis on which faculty assignments for a new school year can be made. There is no explanation for that conclusion.

The District apparently has adopted the interpretation which requires the fewest minority teachers in schools which previously had a predominantly Anglo faculty. In 1983-84, there were 13 schools with one Black teacher and 27 schools with one or no Hispano teachers. After the large scale administrative reassignment of teachers in 1974, the minimum ratios have been maintained principally through assignment of new teachers and voluntary teacher transfers.

The plaintiffs contend that the correct interpretation of the requirement is to use a ratio of all minority teachers

to Anglo teachers. Additionally, they urge that fractions of less than one-half should not be disregarded and current year data should be used. With this interpretation, the plaintiffs determined that for 1983-84, there were these deficits:

School	Deficit	School	Deficit	School	Deficit
Force	1	Henry	2	Jefferson	4
Newlon	1	Baker	1	Kennedy	3
Remington	1			Lincoln	3
Cheltenham	1			West	2
Sabin	1				
Westwood	1				
Johnson	1				

In this particular dispute, the parties have overlooked the language of the Tenth Circuit Court of Appeals. Whatever ambiguity may exist in paragraph 19A of the district court's 1974 Decree, the appellate court made it clear that it was affirming an order which it construed as requiring that the District "assign its personnel so that, in each school, the ratio of minority teachers and staff to Anglo teachers and staff shall not be less than 50% of the ratio of minority to Anglo staff in the entire system." *Keyes*, 521 F.2d at 484. There is no ambiguity in that language, and it is the law of the case, binding on this court as well as the parties. Accordingly, the District's view is incorrect and the District has been out of compliance with this requirement during all of the intervening school years. Additionally, "rounding down" instead of "rounding up" of fractions is not in compliance with the tenor of the Decree which was to remedy, as much as possible, the prior practice of assigning Black teachers to Black schools as "role models."

The April 17, 1974 Order did not expressly require the District to reduce minority to Anglo teacher ratios in each school below a specified maximum; however, paragraph

19A provides that "principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial or ethnic composition of a staff indicate that a school is intended for minority students or Anglo students."

The evidence presented at the hearing indicates that the District has not had any expressed policy of limiting the concentration of minority teachers in the minority schools using specific guidelines such as are set out in the April, 1974 Order for schools with a high concentration of Anglo teachers. On cross-examination Dr. Stetzler, executive director of personnel for the school system from 1974 to 1982, testified that the District never did establish any guidelines for determining when a school had too many minority teachers, stating that it was "a matter of judgment."

Dr. Welch, the District's expert witness on teacher assignment and affirmative action at the hearing, testified that he did not examine, and by implication was not asked to examine, the extent to which the schools with historic concentrations of minority teachers, or formerly segregated minority schools, still had minority teachers disproportionately represented or over-represented.

As support for its assertion that the District is unitary with regard to the assignment of school faculty, the defendants argue, somewhat disingenuously, that in 1976 there were only 8 schools whose Black faculty exceeded 20% and only one school whose Hispano faculty exceeded 20%. It is not clear why the District chose 20% as a comparison figure. In 1976-77, the percentage of Black teachers in the district was 10.67% and the percentage of Hispano teachers was 6.17%, so that the 20% figure for minority teachers in a particular school is significantly above the 1976 minority averages. However, using the same 20% figure for

later years, the District fails to point out that the number of schools at which the Black faculty equalled or exceeded 20% steadily increased so that in 1983-84 there were 33 schools in which the Black faculty equalled or exceeded 20% and 11 schools in which the Hispano faculty equalled or exceeded 20%

In 1976-77, there were no schools whose Black or Hispano faculty was greater than or equal to 30% of the total faculty. In 1983-84 there were 8 schools whose Black faculty met or exceeded 30% and 5 schools whose Hispano faculty exceeded 30%. It is true that during this period the percentage of minority teachers in the district increased. In 1983-84 the district-wide percentage of Black teachers was still only 13.79%, and the Hispano percentage was 9.67%. Therefore, the 20% figure used by the District was nearly 1.5 times the district average for Black teachers, and twice the District average for Hispano teachers.

The schools with a high percentage of minority teachers are, in large part, the same Park Hill and core city schools identified by the Supreme Court in *Keyes*, 413 U.S. at 192-193 nn. 3,4. Seventy-five percent of the schools listed below are north of Ninth Avenue. Comparing the location of the listed school with its percentage of minority teachers and the minority residential patterns in Denver, reflected in the census data maps submitted by the District, it appears that the concentration of minority teachers in the schools is correlated to minority residential patterns.[5]

[5] It is to be remembered that there now are bilingual programs in effect at some schools as a consequence of this court's orders entered in that phase of this litigation. The interaction of the language proficiency order and the desegregation requirements is discussed infra.

Schools with not less than 20% Black faculty in 1983-84 (% Black faculty in district = 13.79%)

Amesse	36.0%	–
Ford	36.0%	–
Teller	35.7%	
Stedman	35.0%	*
McGlone	32.0%	–
Ebert	30.8%	#
Oakland	30.8%	–
Wyman	30.0%	#
Cole	29.2%	#
Montclair	28.6%	
Barrett	27.3%	*
Smith	26.9%	*
Whiteman	26.3%	
Park Hill	25.9%	*
Smiley	25.0%	*
Swansea	23.8%	#
Palmer	23.1%	
Montbello	22.7%	–
Columbine	22.7%	#
Hallett	22.7%	*
Harrington	22.7%	#
Holm	22.2%	
Gilpin	22.2%	#
Carson	22.2%	
Mitchell	21.4%	#
Grant	21.2%	
McMeen	21.1%	
Cowell	21.1%	
Asbury	20.0%	
Philips	20.0%	*
Samuels	20.0%	
Manuel	20.0%	#

Schools with not less than 20% Hispano faculty in 1983-84 (% Hispano faculty in district = 9.67%)

Bryant-Webster	40.7%	#
Fairmont	34.6%	#
Crofton	33.3%	#
Gilpin	33.3%	#
Del Pueblo	33.1%	
Greenlee	29.4%	#
Columbian	25.0%	
Fairview	22.2%	#
Smedley	21.7%	#
Edison	21.4%	
Valdez	20.6%	

* Park Hill schools
\# Core city schools
– New schools built in Montbello area since 1973.

Comparing the same variables for the schools with an assigned allocation of Anglo faculty greater than 88% indicates that many of these schools, marked below with a "+", are located in extreme south and southwest Denver.

Newlon	89.74%
Force	89.74%
Remington	89.47%
T. Jefferson	89.25% +
Cheltenham	88.89%
Sabin	88.89% +
Kennedy	88.75% +
Henry	88.37% +

Using an upper limit of 50% above the district average for Black and Hispano teachers, in 1983-84 there were 28 schools which exceeded that limit for Black teachers, and 21 schools which exceeded that limit for Hispano teachers.

Dr. Charles Willie, an expert witness called by the plaintiffs, examined the current distribution of the District's teachers and determined that the Black teachers within the Denver School System were not randomly distributed in a way that would be similar to their proportion in the total district. Using a deployment criterion of ± ⅓ of the District average for Black and Hispano teachers, Dr. Willie testified that in the 1983-84 school year there were approximately 35 schools in Denver in which the proportion of Black teachers was greater than ⅓ of the district-wide percentage. There were approximately 33 schools, or 63% of the schools in the district, in which the proportion of Black teachers was smaller than ⅓ of the district-wide percentage. Similar results were obtained for Hispano teachers. Dr. Willie opined that the Denver School System needs clearer and more specific guidelines because its good faith efforts have not enabled it to deploy its teachers to avoid racial identification of schools.

Dr. Willie also testified that while he was a member of the Compliance Assistance Panel, he recommended several teacher deployment guidelines which the District could use. The District's initial response was that the court never ruled on the guidelines for the hiring, retention and deployment of teachers, and because the court had never ruled on that issue, the School System was not inclined to institute such requirements voluntarily. From the totality of the evidence, this court finds that the District has tended to interpret the Decree's mandate for minimum percentages of minority teachers as the maximum for schools with large Anglo enrollments and has failed to place any maximum minority percentages for the schools with large minority pupil populations. The conclusion is that there is a sufficient residue of segregation in faculty assignments to deny a finding that the District has been desegregated in that respect.

Hardship Transfers

Both in the 1982 and the 1984 evidentiary hearings, the plaintiffs/intervenors have asserted that the "hardship transfer" policy has functioned as the equivalent of a "voluntary transfer" program resulting in resegregative effects on pupil assignments. The evidence on this point is somewhat limited by the recordkeeping practices of the District. While the application for a hardship transfer, made by the parents and processed through the school of assignment, requests information concerning race and the reason for the transfer, the effects of the transfer on the transferor and transferee schools are not reflected in the records kept in the school administration office where this process is completed. The principal reasons for hardship transfers are babysitting in the elementary schools and work opportunities for students in high school. Be-

cause a transfer will be given to the school nearest the residence of the babysitter, and to a high school closer to the work place, there is an obvious opportunity for manipulation by the transferors. That opportunity has provided the basis for the suspicions asserted by the plaintiffs who have pointed to some impact on schools such as Mitchell.

In response to interrogatories, the District provided data on the hardship transfers approved in the 1983-84 school year by race or ethnicity into and out of each school. With this information, the plaintiffs' expert witness computed the net effect of hardship transfers on the Anglo percentage in each school. The response to plaintiffs' interrogatories listed each school with a count of the transfers into the school by race and the name of the transferor school. From this information, the witness calculated the total transfers into and out of a particular school by ethnicity and combined these figures to obtain a net change. The net effect on the percentage of Anglo students was computed by comparing the percentage of Anglos in a particular school without any transfers to the percent Anglo in the school with hardship transfers. The net Anglo change does reflect the overall effect on a particular school but does not indicate whether the change is due primarily to Anglo student transfers in or minority student transfers out.

The final results of this analysis show 17 elementary schools with an Anglo population which either increased or decreased by more than 1.5 percentage points due to hardship transfers, and 4 elementary schools with an Anglo percentage which changed by more than 3 points. There are no middle or senior high schools with a net Anglo change greater than 1.5 points. While the defendants argue that in the context of the entire school system

these changes are insignificant, a look at the particular schools involved is instructive and shows small scale effects which can be considered significant in light of the history of this case.

The four elementary schools with greater than a 3 point change in 1983-84 are Barrett, −4.02, Crofton, −5.48, Mitchell, −3.38, and Bromwell, +4.72. In 1983-84, all of these schools were outside of the accepted range for Anglo population. Barrett and Crofton would have been within the range without the hardship transfers. Since 1979-80, the percentage of Anglo students at Bromwell, which is not a paired school, has been steadily increasing and has varied between +7.3 and +13.5 percentage points above the range. Since 1983-84, Mitchell has been below the range by at least 6 points. Barrett, Crofton and Mitchell are formerly racially identifiable schools in the Park Hill or core city area. (In 1968, Barrett was 0.3% Anglo; Crofton was 5.0% Anglo; Mitchell was 0.8% Anglo; and Bromwell, which is located in central Denver, was 92.0% Anglo).

The middle and senior high schools with the greatest changes were Cole with a net Anglo decrease of 1.36%, and Manual with a net Anglo decrease of 1.35%. As a result of hardship transfers, there was a net increase of 22 Black and Hispano students at Manual. Cole and Manual were the only junior and senior high schools in 1968 which were over 95% Black. From 1974 to 1982, the percentage Anglo in both Cole and Manual was between 50% and 60%. In 1982, the percentage Anglo in Cole decreased to 35% and dropped to 34% in 1983-84. The percentage Anglo at Manual remains at approximately 50%.

In commenting on the plaintiffs' transfer analysis, the defendants' witness, Dr. Ross, testified that in 1983-84, more minority than Anglo students received hardship or

babysitting transfers, which indicates that the District is not permitting such transfers to be used to avoid the desegregation plan. In 1983-84, there were a total of 1674 transfers granted, including 679 Anglo students, 515 Hispano students and 400 Black students. There also were a few transfers for Asian and Native American students. Expressed as percentages, there were 40.56% Anglo, 30.76% Hispano and 23.89% Black student transfers. These percentages are nearly equal to the percentages of the total student population for these groups in 1983-84, which were 39.18% Anglo, 33.33% Hispano and 22.72% Black. No conclusion can be drawn from the aggregate distribution of student transfers among Anglos, Blacks and Hispanos.

The District also argues that the plaintiffs' data do not show whether the transfers which resulted in Anglo loss in the identified schools had a positive effect on the ethnic composition of the sending school. A look at the individual data for Bromwell shows that the students who transferred into Bromwell were almost exclusively Anglo students. Thirty-one of the 34 transfers into Bromwell were Anglo students, and 13 of the 31 students transferred from the core city and Park Hill schools—Crofton, Fairmont, Harrington, Smedley, Smith, Stedman and Whittier-identified by the Supreme Court in *Keyes*.

Bromwell may be atypical. There is no other school with such a large net increase in Anglo population due to transfers. Yet the fact that the schools with the largest net changes are the schools which have historically been the racially identifiable schools is some evidence that for those schools the hardship transfer may have been used to avoid the desegregation plan.

The District has done the minimum required in keeping records and maintaining the policy that it would refuse a transfer if the express reason given was "race." The

District has failed to monitor the system-wide effect of the transfers, leaving the decision to the principal of the receiving school. In fact, prior to the 1982 hearing, no record of ethnicity was kept in the central card filing system. The plaintiffs' analysis of 1983 84 transfer data appears to be the first such system-wide analysis, and it does reveal that the effects of transfers in certain schools are significant and are contributing to the racial identification of those schools. In addition, the schools affected are some of the schools initially at issue in this lawsuit.

While the resulting finding is that the plaintiffs' data will not support the argument that the District has maintained an "open enrollment" policy through hardship transfers, the evidence shows a lack of concern about the possibility of misuse and a lack of monitoring of the effects of the policy.

There has been no challenge to the manner in which the District has applied the facilities and physical resources, and there is no contention that there has been any racial disadvantage operating in the extracurricular activities in the district.

THE FUTURE

The District seeks an order that not only would declare the school system unitary, but would vacate the permanent injunction entered in this action and end this court's jurisdiction over the matter. The law in the Tenth Circuit is that a district court must retain jurisdiction in these circumstances until it is convinced that there is no reasonable expectation that constitutional violations will recur.

> We believe that the court, in exercising continuing jurisdiction to achieve structural reform, cannot

> terminate its jurisdiction until it has eliminated the constitutional violation "root and branch." *See Green v. County School Board*, 391 U.S. 430 (1968). The court must exercise supervisory power over the matter until it can say with assurance that the unconstitutional practices have been discontinued and that there is no reasonable expectation that unconstitutional practices will recur.

Battle v. Anderson, 708 F.2d 1523, 1538 (10th Cir. 1983), *cert. dismissed*, ____ U.S. ____, 104 S.Ct. 1019 (1984) (footnote omitted). The opinion in *Battle* cited *Green* as precedent in holding that the district court had not abused its discretion in retaining jurisdiction over Oklahoma state prisons although the constitutional violations had been eliminated.

Accepting the defendants' argument that the modified 1974 Final Judgment and Decree was a complete and adequate remedy which the District has fully implemented, jurisdiction should continue because the record does not support a finding that there is adequate protection against resegregation. To the contrary, the court is compelled to conclude that resegregation is inevitable if the School Board follows state law.

Resolution No. 2228, modeled after the resolution in *Spangler*, reaffirms the commitment of the Board of Education to the operation of a unitary school system. Neither the resolution, nor the testimony of the individual members of the Board of Education, gives any indication of how that will be accomplished in the absence of continued "forced busing," so long as the neighborhood school concept is preferred and the neighborhoods are not integrated. But, as the plaintiffs have observed in their brief, the Constitution of the State of Colorado expressly prohibits the use of such busing in the following language of the "anti-busing" amendment, adopted in 1974:

> No sectarian tenets or doctrines shall ever be taught in the public school, nor shall any distinction or classification of pupils be made on account of race or color, *nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance.*

Colo. Const. Art. IX, § 8 (emphasis added).

That is the organic law of the State of Colorado, and it is directly in conflict with the pupil assignment plan now in effect in the Denver School system. If the court's jurisdiction is removed it must be presumed that the members of the Board of Education, under the oath required of them by state law, will obey this requirement of the state constitution, and dismantle the entire pupil assignment plan. To this argument, the District has made no response in the reply brief. This constitutional provision, standing alone, makes this case far different from the *Spangler* decision upon which the District so heavily relies. Putting the point simply and directly, it is the authority of this court, under the supremacy clause of the United States Constitution, that permits the operation of the Denver public schools under the existing plan which would otherwise be a clear violation of the Colorado Constitution and in the absence of that plan, the system would be dual.

Above and beyond this legal impediment to maintaining a unitary school system, there is nothing before the court to give any assurance that the Board of Education will not permit resegregation to occur as a result of benign neglect. The District has done nothing to establish any means for monitoring operations to assure the avoidance of racial disadvantage. There is no clear commitment to the use of the guidelines prepared by the Ad Hoc Committee and adopted by the Board. In this regard, the

court has some concern about the defendants' response to the contentions made in the intervenors' brief. Essentially, that response is that these are matters which are outside of this litigation. Yet these concerns about the effects of discriminatory attitudes on academic achievement, discipline and dropouts are the very core of the whole matter of segregative policy in education as a violation of the United States Constitution. It is true that there is nothing in the law which does or could require equality in the results of educational services. But, since the sociologists tell us that sanctioned discrimination has these adverse effects on the individuals within the affected groups, the existence of disparate results suggests the possibility that continued discriminatory practices are present. It was to address these matters that the court offered the services of the members of the Compliance Assistance Panel. There is cause for concern about commitment when the Board and administrative staff seem to have not only rejected, but scorned such an effort at assistance in a difficult task.

In the defendants' briefs, much is made of the argument that findings in this case are based on broad constitutional principles rather than narrow statutes. That is true in a technical legal sense. Yet, as the courts have considered cases under the civil rights acts, both those adopted shortly after the approval of the Fourteenth Amendment to the United States Constitution, and those of more recent vintage, it is increasingly apparent that Congress has sought to assist in making the principle of equal protection of the laws a more practical and workable doctrine by giving it more specific definition in such areas as employment, voting and participation in publicly funded programs. Thus there is an observable convergence of constitutional principle and statutory prohibition. It may well be that in future school desegregation litigation, the con-

cepts of "disparate treatment" and "disparate impact," so well known in employment cases, will come to be the focus of attention.[6]

It is paradoxical that the defendants' presentation to this court in support of the subject motion has placed such heavy emphasis on the use of statistical displays to demonstrate the establishment of a unitary system when the thrust of the *Spangler* decision is to decry the rigidity of defining desegregation according to any fixed racial ratio. Both in 1979 and in 1982, this court emphasized the importance of recognizing that establishing and maintaining a unitary school system requires more than meeting a statistically satisfactory pupil assignment plan. The expert testimony in this case concerning the use of racial balance and racial contact indices, and the differing conclusions reached by the experts called by the respective parties, demonstrate once again the facility with which numerical data may be manipulated and discriminatory policies may be masked.

The plaintiffs/intervenors have strongly suggested that the Board of Education acted in bad faith in adopting Resolution No. 2228 in December, 1983 after giving this court and the parties assurance in a hearing memorandum filed April 15, 1983, that the District was following the Ad Hoc Committee guidelines in planning for pupil assign-

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[6] Disparate impact and disparate treatment are alternative theories for relief under Title VII, 42 U.S.C. §§ 2000e-2000e-17. "While proof of discriminatory motive is necessary under a disparate treatment theory, such proof is not required under a disparate impact theory. (Citation omitted) For the latter, it is enough that the employment practices had a discriminatory *effect*." (Emphasis in original). *Williams v. Colorado Spring, Colorado School District No. 11*, 641 F.2d 835, 839 (10th Cir. 1981). *See also Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, ____ U.S. ____, No. 84-1200 (May 20, 1985); *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531 (9th Cir. 1982).

ments for 1984 and subsequent years. The plaintiffs also cite the testimony of School Board members from the trial that after the May, 1983 School Board election, Board members determined that there would be no changes in the plan.

The issue of good or bad faith of those Board members is irrelevant. As the history of this case has shown, the philosophical and political views of the elected Board will vary as is to be expected in representative government. Indeed, remembering that this case began when a Board resolution was repealed by a succeeding Board, little reliance can be placed upon Resolution No. 2228, or any other resolution, as directing future boards. What must be accomplished in constructing the final and ultimate permanent injunction in this case is the creation of means and mechanisms to prevent any future policy of discrimination, whether it results from intentional governmental action or simply in consequence of a policy of disregard or permissive passivity.

The District has made a very expansive interpretation of the Supreme Court's *Spangler* opinion. The contention is that once a district has implemented an adequate desegregation plan and has maintained it for a reasonable period of time, it is entitled to be freed from further court jurisdiction even if resegregation occurs in the sense that schools become racially identifiable, if that result obtains from "demographic changes" and not because of official board action. The point is emphasized because under *Swann* there is no right to a particular degree of racial balance in each school. The fundamental error made by the district court in *Spangler* was the imposition of the rigid requirement that there be "no majority of any minority" in any school in perpetuity. The language of the majority opinion in *Spangler* can be read to support the defendants' contention. Yet, *Spangler* must be read in con-

text with *Green* and *Swann*, as well as the language in the later cases of *Dayton II* and *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979). As the defendants' counsel have noted, the Supreme Court has not clearly articulated the time and manner within which a school desegregation case should be closed. Additionally, the Court has never defined "unitary." In this case, the School Board itself has been cooperative with the court in constructing a working definition of that concept by the adoption of the Ad Hoc Committee report and its guidelines, which this court approved in the 1982 opinion, and which the Board has again recognized in Resolution No. 2228.

What is of first importance in considering whether *Spangler* requires this court to terminate this case at this time is whether the Denver Public School System was unitary for the years 1976 through 1979. That, in turn, depends upon whether it is appropriate to parse the criteria in *Green*, and this court's own definition of unitariness, to separate out pupil assignments from the other elements.

The measure of the adequacy of any desegregation plan is its effectiveness. It would be inappropriate to consider that a pupil assignment plan which simply establishes certain outside percentage limits for minority and Anglo students is, by itself, an effective elimination of the effects of prior segregative policies. That is why the *Green* case emphasized the other components of desegregation. In this case, it is this court's finding that there has not been an effective faculty assignment plan and, therefore, that omission by itself prevents the declaration that unitariness has been achieved.

Beyond that, it is this court's view that dicta in *Dayton II* and *Columbus* strongly suggest a more limited reading of the prohibition in *Spangler*. Thus, Justice White, in

writing for the majority in *Columbus*, restated the proposition from *Swann* that school construction and abandonment practices cannot be used to perpetuate or reestablish a dual school system. In *Dayton II*, Justice White, again writing for the majority, said that pupil assignment plans are also not to be used to perpetuate or reestablish dual school systems.

It was the need to close four elementary schools and the change of educational policy to convert junior high schools to middle schools that brought the District back to this court in 1982. Those changes, of course, required a redetermination of the pupil assignment plan, and that was done in the Consensus Plan. The resegregative effects of the Consensus Plan are brushed aside by the District with the claim that this is another illustration of the white flight phenomenon after a court order reassigns attendance zones. This court is not persuaded that this proposition has been demonstrated by the evidence. As earlier noted, there appear to be flaws in the data which have been submitted on the subject of white flight. But, assuming white flight, the community response to a desegregation plan is an element in measuring its effectiveness. Indeed, that was the reason that Judge Doyle appointed the Community Education Council as a monitoring committee to help the School Board obtain community acceptance. It is, therefore, no answer that any resegregation was not the *fault* of the School Board.

It is also an inappropriate response to contend that this resegregative effect cannot be considered because the 1982 opinion approved the Consensus Plan. The record is clear that the approval then given was with reservations and that the rejection of the plaintiffs' alternative proposals was a concession to the plea for "stability" and the avoidance of more disruption, recognizing that the District was then working on future planning.

While it is true that this has not been a case in which there has been an effort to develop "step at a time planning," it is also true that until the filing of the subject motion, the record in this case showed that all parties and the court were working with the premise that long-range planning was required, and that some final injunctive order would enter. As already noted, this court explicitly stated in its 1982 Opinion that the District had not become unitary.

It is clear from the testimony of the School Board members that the idea that desegregation had been achieved came from the work of a consultant with expertise in statistical analysis. The data developed in that study persuaded the Board that desegregation had occurred when measured by the racial balance and racial contact indices. The argument that desegregation is therefore demonstrated is just as facile and unrealistic as the rejected view of the district court in *Spangler.*

The testimony of the Board members also makes it clear that their motive in seeking a termination order is the sincere belief that the school system will benefit by removing a "stigma" that they believe has attached to it from the court's involvement. It is said that the necessity to come to the court for approval has inhibited creative planning and new educational development. While that may be the perception of many, there is no support for it in the record of this court's involvement. In 1979, the Board was encouraged to pursue new initiatives. The Knight Fundamental School and Gilpin Extended Day School have received the court's approval and the community response has been enthusiastic as this record shows. There has never been any effort to suppress new and innovative developments, and this court has never sought to impose any educational policy. Indeed, in re-

jecting the request to choose between the Total Access Plan and the student assignment plan, the court again took pains to point out the differing roles and responsibilities of the Board of Education and this court.

It is disturbing to hear the views that stigma, punishment and trauma are involved in the processes of this court in this case. It is true that the case has been here for almost a decade, but it is also true that the effort has been to reverse the effects of segregative actions for a similar time. The notion that this court has sought to punish this Board of Education, this staff and the children now in the Denver School System, for past practices is simply wrong. What the court seeks, and what the Constitution demands, is assurance that minority people will not be disadvantaged in the opportunity for education. Thus, it is not punishment, but protection, that is the objective.

This court has carefully considered Resolution No. 2233. That resolution, adopted in April, 1984, after the filing of the subject motion, is a declaration of policies which the Board intends to follow upon termination of additional supervision. Among those policies is the statement that "there shall be no sudden alteration of the court-approved school assignment plan then in effect." It is this commitment which is directly contradictory to the prohibitions of the State Constitution and, as indicated earlier, the reply brief filed for the School Board did not even address this legal dilemma. The resolution also indicates the Board's continuing interest in neighborhood schools with the following paragraph:

> The Board of Education, believing that the beneficial effects of integration are most fully realized in stably integrated neighborhood schools, shall preserve contiguous attendance zones for schools that are in-

> tegrated and shall establish contiguous attendance zones whenever it appears that stable integration can be maintained in the schools serving such areas.

What is not indicated is whether the Board would proceed if the establishment of contiguous attendance zones to serve "stably integrated neighborhood schools" has a resegregative effect on other schools, as measured by pupil assignment ratios. Other aspects of Resolution No. 2233 were discussed in the testimony of Board members, and a fair summation of that testimony is that many matters would have to be studied before detailed implementation of all of the paragraphs of the Resolution could be achieved.

It is also interesting to consider the language of paragraph 2 of the Resolution:

> This Board, the District, and officers and employees of the District shall not adopt any policy or program, institute any practice or procedure, or make or carry out any decision for the purpose of discriminating against any person by reason of race, color, or ethnic identification.

The paragraph can be considered a statement of intention to avoid acts taken with discriminatory intent. It does not indicate that the Board, the District and its officers and employees will take any action to avoid any discriminatory impact of any policy or program. In the testimony of School Board members, there is, again, the complaint that the necessary planning and policy development suggested in the Resolution could not take place under court supervision. Again, the record in this case is to the contrary. In the 1979 Order, this court expressly encouraged innovative and creative thinking by the Board, and indicated a willingness to consider changes. Indeed, the 1982 Order did approve the change to middle schools even

though that change had what the court hoped would be a temporary resegregative effect on the elementary schools. Put simply, there is nothing in Resolution No. 2233 that the Board could not accomplish while still under the supervision of the court, and certainly nothing that could not be accomplished with a permanent injunctive order in effect.

The Board's brief adopts language from the Ninth Circuit in *Spangler v. Pasadena City Board of Education*, 611 F.2d at 1240, to ask this court to address the basic question at this stage in this case: "If not now, and on this showing, when, and on what showing?" Because the court has answered the first part of that question in the negative, it is appropriate to give some guidance with respect to what this court believes the proper showing would be, although this discussion must be prefaced with the caveat that trial courts do not give advisory opinions. The adversary process must be permitted to function in the remaining stages of this litigation.

The Denver Board of Education has obviously been advised that the controlling law on terminating jurisdiction in a school desegregation case is that Ninth Circuit *Spangler* opinion which followed the Supreme Court's opinion. That case was decided by a three judge panel with two separate opinions and one judge concurring in both of them. Without question, both the Supreme Court opinion and the subsequent Ninth Circuit opinion make it clear that there can be no permanent injunction requiring a district to maintain any given degree of desegregation as measured by racial ratios in the schools. This court certainly agrees and has made the same statement in both the 1979 and 1982 opinions. Moreover, this court has no disagreement with the view that school desegregation cases like all other litigation must someday come to an

end. In the 1982 opinion, this court urged the District to proceed with planning for the purpose of developing a final order which could bring this case to conclusion, and said the following:

> The Denver Board of Education continued its positive response in May, 1980, when it adopted Resolution No. 2110, establishing an "Ad Hoc Committee" to design a new student assignment plan and to develop both a definition of and guidelines for constructing a unitary school system. During subsequent hearings, I encouraged that undertaking and said that it was consistent with an orderly approach to creating the conditions and climate for concluding this litigation.

Keyes, 540 F. Supp. at 401.

This court has always recognized that the operations of a public school system, and the determination of the types and amount of educational services to be provided in it, are fundamentally matters of local self-governance. What the history of this case shows, however, is that each time the Denver Board of Education has been given the full opportunity to develop a pupil assignment plan which would avoid the racial identification of any schools, the Board has failed to perform that duty. The reason is self-evident. The total return to neighborhood schools throughout the system under the residential patterns which have existed and now exist would inevitably result in the re-segregation of some schools, particularly at the elementary level. Therefore, it is not possible to avoid forced busing of part of the pupil population, and because overwhelming public opinion in Denver is against forced busing, elected officials have refused to take responsibility for ordering it. It is politically convenient to continue to contend that this contradiction of community will is the result of orders from a court which has misconstrued the law. The length of this opinion is warranted only for the pur-

pose of once again making a full explanation of this court's reasoning. While the court has been patient in the continuing efforts to persuade the parties and the public with respect to the law, it has also repeatedly expressed concern that young people are being disadvantaged in the one opportunity even to them to obtain some level of educational achievement at public expense.

This court is now asked to rely on the good intentions expressed in Resolution No. 2233. In the *Spangler* opinion, the Ninth Circuit judges correctly stated that when such resolutions are made as official acts, they are entitled to be viewed as a pledge made in good faith by the board members and the people they represent. The court does not doubt the good faith of members of the Board of Education and their intention to follow the law. The doubt is with respect to their understanding of the law. That doubt is fueled by the testimony of some Board members who said that since people are and should be free to live in any neighborhood they choose, segregation in neighborhood schools is acceptable.[7] That view is directly contrary to the *Brown* decision and would be a return to *Plessy v. Ferguson*.

Along with the assumption that the Board members will obey the law as they know it, the court must assume that these Board members will comply with the requirement of the Colorado Constitution that prohibits forced busing. How can this court assume that equal educational opportunity will be given to minority students in Denver, Colorado when the Board of Education officially proclaims a commitment to neighborhood schools while there are still segregated neighborhoods, and when the effective

[7] Testimony of Board member Paul Sandoval, Tr. 913-918.

means for integration will be denied them under the organic law of the State of Colorado?

Resolution No. 2223 and the testimony of Board members have given vague allusions to increasing the use of magnet schools, and voluntary enrollment with special programs. It is that kind of speculation which caused the rejection of the Total Access Plan which was presented to the court with no provision for the kind of constraints required to protect against segregative effects. It may well be that through their creativity and industry, the Board and staff will develop plans and programs which can avoid segregative effects, meet the requirements of a unitary system under the court's definition, and avoid conflicts with the Colorado Constitution. Such a showing with appropriate injunctive orders to assure continued effectiveness can certainly result in an order which could terminate this case. Nothing of the kind is in the present record.

The demonstrated uncertainty about the requirements of the law in this case is exactly the reason that a final injunctive order is required to end it. As all counsel in this case and as many lower courts have observed, the Supreme Court has never defined a unitary school system with any specificity. That is not the function of the Supreme Court of the United States. It exists to give general guidance on broad principles of constitutional law, and it is the work of the district courts, as trial courts, to apply those principles to the specific situation with specific orders. That was made clear in *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*), and it is also clear from opinions in the Fifth Circuit Court of Appeals, a court which has been called upon to attempt to articulate the bases upon which school desegregation cases can be ended.

> In testing whether the past has been eradicated so far as it remains in the power of school officials and courts to do so, we must keep in mind that each school district is unique. The constitutional mandate against racial discrimination is categoric, but the determination of remedies for its past violation turns on the conditions in a particular district. [Citation omitted.] In like fashion, the decision that public officials have satisfied their responsibility to eradicate segregation and its vestiges must be based on conditions in the district, the accomplishments to date, and the feasibility of further measures.

Ross v. Houston Independent School Dist., 699 F.2d 218, 227 (5th Cir. 1983).

The Fifth Circuit Court of Appeals requires a district court to retain jurisdiction over a school desegregation action for three years following the determination that the district is unitary to assure that the determination of unitary status is not premature. During that time, the district is required to file semiannual reports with the court. At the end of the three years, a hearing is held at which the plaintiffs may show cause why the case should not be dismissed. The district court then makes a final determination as to whether the district has achieved unitary status and may, at that time, dismiss the case. *Ross, supra*; *United States v. Texas*, 509 F.2d 192 (5th Cir. 1975); *Youngblood v. Board of Public Instruction of Bay County*, 448 F.2d 770 (5th Cir. 1971).

If the present Board members who have been in this court and who have some working knowledge of the issues in this case are confused about what is required of them, certainly it can be expected that future Board members will fail to understand how particular decisions concerning school construction, school closing, faculty assignments, transportation, facilities and extracurricular activities could

have segregative effects because of the past policy in this particular district. Again, the court hopes that the recapitulation of the history of the case contained in this lengthy opinion will, itself, be of some value to decision makers in the future.

Contrary to the perception shown in the defendants' reply brief, the proposed permanent injunction is not criminal in its nature and need not, therefore, be as specific as may be indicated in some of the cases cited. The injunction is equitable and seeks to protect the constitutional rights of persons yet unborn. It need not require particular ratios of pupil assignments to various schools, percentages of faculty ethnicity in schools, specific affirmative action hiring plans, or even any commitment to transportation. It is not required that there be any firm commitment to neighborhood schools, magnet programs or other matters of educational policy. What will be required is the development of a structure within which these decisions will be made by local government which will provide assurance that those who make such decisions will obtain necessary information, give an adequate opportunity for minority views to be heard, and act with concern for and commitment to the constitutional principles of equal educational opportunity. In this respect, what the court is requiring is something not unlike the stop, look and listen requirements of environmental policy legislation.

This court has implied and now makes explicit the view that the Ad Hoc Committee guidelines are 'a good working framework within which that kind of structure can and should be developed.

The plaintiffs have asked for a general injunctive order with certain provisions restricting some of the policies of the District. They also seek certain immediate remedial orders.

During the period established for the briefing schedule at the conclusion of the evidentiary hearing on the subject motion, this court was informed by counsel that they were engaged in serious negotiations for settlement of this case. The briefing schedule was altered to accommodate that effort. It now appears appropriate, having determined that the District has not yet achieved a completely unitary status for the reasons set forth at length above, and the court having defined what is necessary, including the general outline of a permanent injunction, that the court should provide a new opportunity for the parties to come together to develop an agreed order. It is hoped that negotiations will go forward and agreement will be reached just as the limited English proficiency issues were resolved after the entry of the court's Memorandum Opinion defining the applicable principles of law. In that regard, in accepting the stipulated program for limited English proficient students by the Order entered August 17, 1984, this court reserved for later decision the determination of methods for reporting on the implementation of that program and the question of continuing jurisdiction. That reservation was made to avoid any prejudging of the matter which is now being resolved by this opinion. Accordingly, at this time both phases of this case converge, and the monitoring of the language program and continuing jurisdiction with respect to it will also be matters to be discussed in the negotiations which will be undertaken.

Recognizing that a recent election has been held and that there may be some uncertainty about how negotiations may be conducted and to what extent counsel will be authorized to proceed with them, it would be unrealistic to set a specific timetable for that effort. Accordingly, the court will direct that counsel meet with the court to discuss the scope and course of negotiations.

Upon the foregoing, it is

ORDERED, that the defendants' motion to declare School District No. 1 unitary, to terminate jurisdiction, and to vacate or modify the 1974 Final Decree and Injunction is denied, and it is

FURTHER ORDERED, that counsel for all parties shall meet with the court in the court's conference room for a discussion of the possibilities of negotiation and settlement on *June 28, 1985* at *1:00 p.m.*

Dated: June 3, 1985

BY THE COURT:

_____

Richard P. Matsch, Judge

APPENDIX C

[OCTOBER 1985]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-1499

WILFRED KEYES, et al.,

Plaintiffs,

v.

CONGRESS OF HISPANIC EDUCATORS, et al.,

Plaintiff-Intervenors,

v.

SCHOOL DISTRICT NO. 1, et al.,

Defendants.

ORDER FOR FURTHER PROCEEDINGS

On January 19, 1984, the defendant, School District No. 1, Denver, Colorado, filed a motion for orders (1) declaring that the defendant School District is unitary, (2) modifying and dissolving the injunction as it relates to the assignment of students to schools, and (3) declaring that the remedy previously ordered in this case to correct the Constitutional violation as found has been implemented, and that there is no need for continuing court jurisdiction in this matter. The plaintiffs and plaintiff-intervenors

opposed that motion, and asserted their own motion for remedial orders and continuing injunctive relief. After a full evidentiary hearing was held, this court made extensive findings of fact and conclusions of law in the form of a Memorandum Opinion and Order entered June 3, 1985.

In summary, this court found that the 1974 Final Judgment and Decree, as modified in 1976, did not completely remedy the constitutional violations found in the course of this litigation because it did not completely reverse and eradicate the effects of the official policy of geographical containment of black people in an area of northeast Denver. This court also found that the defendant School District had not achieved unitary status because there were racially identifiable schools; the policies relating to "hardship" transfers and the monitoring thereof were inadequate to assure that there were no segregative—effects at either the transferee or the transferor schools; there was a failure to comply with paragraph 19A of the 1974 Decree relating to the assignment of minority faculty, and with regard to the over-representation of minority faculty in formerly segregated minority schools with under-representation in formerly segregated anglo schools; and, finally, the School District had failed to take any meaningful action to provide any reasonable expectation that constitutional violations will not recur in the future after this case is closed.

After making these findings and conclusions, this court did not order any corrective action and urged the parties to seek a negotiated settlement of the remaining issues. That effort has continued and, on October 4, 1985, counsel for the parties advised the court that they had failed to reach a resolution acceptable to all parties. Accordingly, this court must now act. Because compliance

with the law as interpreted in this litigation involves determinations of educational policy within the sole authority of the Board of Education, the defendant Board should now be required to submit plans for achieving unitary status as that has been defined in this court's Memorandum Opinion and Order of May 12, 1982 (540 F.Supp. 399), and to provide reasonable assurance that future Board policies and practices will not cause resegregation. The particular matters to be addressed are as follows:

1. *The identification of Barrett, Harrington and Mitchell elementary schools as schools for minority children.*

The construction of Barrett Elementary School in 1960 in a black neighborhood was one of the most obvious indications of the former policy of racial segregation in the Denver school system. Throughout this entire litigation it has remained a racially-identifiable school, and the adoption of the Consensus Plan had further segregative effects at that school. Mitchell Elementary School has also existed as an identifiable minority school throughout the years, and it, too, has been adversely affected by the Consensus Plan, as has Harrington School. The trend toward racial isolation of these three schools was one of the plaintiffs' and intervenors' objections to the Consensus Plan and a primary reason for the reluctance with which this court accepted that plan as an interim pupil assignment plan. It is past time to integrate these three elementary schools into the Denver system.

2. *The "hardship" transfer policy.*

While this court did not find that the hardship transfer policy amounted to an "open enrollment" program as contended by the plaintiffs and intervenors; there is sufficient continuing doubt and suspicion about this program

that the District should take action to articulate definite standards for such transfers, and to monitor the program to assure that these transfers do not have segregative effects on either the transferor or transferee schools.

3. *Faculty assignments.*

The District has never been in compliance with the requirements of the 1974 Final Judgment and Decree relating to faculty assignments. The ambiguity in paragraph 19A of that decree has now been resolved, and some reassignment of faculty is necessary. Additionally, this court has found that there has been a continuing failure to limit concentration of minority teachers in schools correlated to minority residential patterns. Some additional teacher deployment guidelines must be established to avoid any public perception that minority teachers should be assigned primarily to schools with heavy minority pupil populations.

4. *Plans for implementation of Resolution No. 2233.*

The defendant Board of Education has asked this court to rely on the good intentions expressed in Resolution No. 2233 and return full responsibility for the protection against future resegregation to those who are elected to govern the District. In the June 3, 1985 Memorandum Opinion and Order, this court observed that the defendants did not put forth any detailed plans for implementing Resolution No. 2233 and, most particularly, the Board of Education and its counsel failed to explain to this court how a non-segregative pupil assignment plan could be followed without a court order when any such plan would be in violation of the "anti-busing" amendment to the Colorado Constitution, adopted in 1974 and incorporated in Article IX, Section 8 of the Colorado Constitution.

Upon the foregoing, it is now

ORDERED that on or before December 2, 1985, the defendants will file with this court plans which address the foregoing matters, and the plaintiffs and plaintiff-intervenors shall have to and including December 16, 1985 within which to file objections to or to file alternative plans on such matters, and the disagreements among the parties will be the subject of further hearings in this court.

Dated: October 1985

BY THE COURT:

_____

Richard P. Matsch, Judge

APPENDIX D

[FEBRUARY 25, 1987]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-1499

WILFRED KEYES, et al.,

Plaintiffs,

CONGRESS OF HISPANIC EDUCATORS, et al.,

Plaintiff-Intervenors,

v.

SCHOOL DISTRICT NO. 1, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

On June 3, 1985, this court issued a Memorandum Opinion and Order ("June 1985 Opinion") denying the defendants' motion of January 19, 1984. That motion requested an order declaring that School District No. 1 is unitary, an order modifying and dissolving the existing injunction relating to the assignment of pupils to schools, and an order declaring that this court's remedial orders have been fully implemented and there is no further need for continuing court jurisdiction. After the parties reported that their extensive efforts to reach a negotiated settle-

ment of the remaining issues had failed, this court entered an Order For Further Proceedings on October 29, 1985 ("October 1985 Order"). That order directed the defendant to submit plans for achieving unitary status as defined in this court's Memorandum Opinion and Order of May 12, 1982, *Keyes v. School District No. 1, Denver, Colorado*, 540 F. Supp. 399, 403-04 (D. Colo. 1982), and to provide reasonable assurance that future Board policies and practices will not cause resegregation. The court directed that four particular matters be addressed: (1) the identification of Barrett, Harrington and Mitchell elementary schools as schools for minority children, (2) the "hardship" transfer policy, (3) faculty assignments, and (4) plans for implementation of Resolution 2233.

The defendants appealed from the June 1985 Opinion and the October 1985 Order. Despite the appeal, the defendants have responded to the court's directions for further proceedings, and the plaintiffs and plaintiff-intervenors ("plaintiffs") filed a reply on December 16, 1985. A hearing was held on March 13, 14 and 15, 1986. Evidence was presented concerning the actions and plans set forth in the defendants' response and supplemental response and plaintiffs' alternative proposals.

The Defendants' Responses

Barrett, Harrington and Mitchell Schools. The District seeks to increase the Anglo enrollment at Barrett, Harrington and Mitchell elementary schools by the use of special programs and educational enhancements. The Barrett/Cory paired elementary schools are using a teaching method called the Whole Language Program, designed to increase emphasis on language development. An instructional computer program complements the curriculum. The

Ellis/Harrington paired elementary schools use the Mastery Learning Program, a prescriptive teaching method, and an instructional computer program. The Montessori Method has been started at Mitchell to improve the effectiveness of the Mitchell/Force elementary school pair. The District has also increased communication with parents and is upgrading the physical appearance of these facilities to support the paired school concept.

Student Transfers. DPS Policy 1226D provides new procedures for the administration of parent-initiated transfers from the school of assignment for day-care needs at the elementary level, and program needs at the secondary level. It also directs new record-keeping and analyses of the effects of such transfers. DX-D(86). The Assistant Superintendent has responsibility for granting or denying such applications, within stated restrictions on the exercise of discretion. The objective is to discourage requests for transfers that are not based on genuine necessity by obtaining independent verification of the need. Most importantly, the new data collection and monitoring processes should enable the administration to evaluate any resegregative effects of the policy.

Faculty Assignment. A new policy on teacher assignments has been implemented. It is stated as follows:

POLICY ON TEACHER ASSIGNMENT

> The District will continue to assign teachers so that the teaching staff at each school will reasonably reflect the racial/ethnic composition of the total teaching staff.
>
> Beginning with the school year 1985, this shall mean that, to the extent practicable, the percentage of minority teachers, respectively, at each school shall be within one-third of the applicable elementary (1-6), middle (7-8), or high school (9-12), percentages. When

> the required minimum number includes a fraction, the minimum shall be considered to be the next higher integer.
>
> It is recognized that fulfilling the requirements of the bilingual program will require departure from the above guideline in a number of schools and that availability of qualified teachers for particular positions is among the factors that may make achievement of the above goal impracticable in some instances.

DX-A(86).

Mr. Andrew Raicevich, Director of Personnel Services, testified that he has interpreted this statement to mean that the required percentage is the number of minority teachers at the respective levels compared to the total number of teachers at those levels, and that this percentage is applied as both a minimum and a maximum. Additionally, in the reply brief, the defendants have accepted the principle that "rounding" of fractions should be symmetrical at both the lower and upper ends to keep the whole numbers within the specified range. The policy provides for adjustments necessary for the bilingual program.

Further Relief Sought By Plaintiffs

The plaintiffs do not object to the implementation of these programs and policies, but assert that they are inadequate to make the system unitary. Additionally, they request further relief, not only by providing more specific directions to implement the 1974 Decree but, also, the entry of new orders to remove all vestiges of past discrimination and to protect against resegregation. They contend that the evidence developed at the 1984 and 1986 hearings supports the need for additional measures.

Barrett, Harrington and Mitchell Schools. The plaintiffs' witness, Dr. Stolee, expressed skepticism about the effectiveness of the Whole Language Program at Barrett, but he was enthusiastic about the Mastery Learning Program at Harrington and the Montessori Program at Mitchell. The plaintiffs observe that only time will tell whether any of these programs will increase Anglo enrollment. Their principal concern is the potential effect of the Montessori Program at Mitchell on Force, recognizing that as the program develops the non-Montessori pupils from Mitchell will be assigned to Force. Additionally, the plaintiffs suggest that the magnet program enrollments be controlled to within plus or minus 15% of the elementary Anglo percentage, and that no transfers be allowed from schools where the effect would be to reduce the Anglo percentage below 10% of the elementary average.

Student Transfer Policy. The plaintiffs assert that the evidence at the 1986 hearing reinforces this court's concern about the segregative effects of the hardship transfer policy expressed in the June 1985 Opinion. Importantly, the District could not produce adequate data concerning the parent-initiated transfers, and Dr. Stolee presented an analysis, with exhibits, showing that fifteen formerly Anglo schools had their Anglo percentages increased by transfers, while fifteen formerly minority schools lost Anglos because of transfers. More than 10% of all elementary pupils attended schools other than their school of assignment through use of the transfer policy. The focus of the new policy is on the impact of the transfer on the receiving school, rather than on both the receiving and sending schools. It is not clear if the policy will be applied to the magnet programs. Only carefully monitored implementation of Policy 1226D will indicate whether it effectively prevents circumvention of the pupil assignment plan.

Faculty Assignment. The plaintiffs contend that the continued over-representation of minority teachers at former minority schools and under-representation at former Anglo schools, even under the new policy, is attributable to the fact that reassignments are made in the late spring or late summer and not adjusted in the fall. Additionally, they assert that the exclusion of kindergarten and special education teachers has no rational basis, and that the District has not presented sufficient data to justify the bilingual teacher exception.

Further Relief. The plaintiffs contend that either by modification of the existing remedial orders, or by the entry of new orders, this court should exercise its continuing jurisdiction to provide more specific directions on matters which go beyond the October 1985 Order. More particularly, they urge that this court direct the adoption of Dr. Stolee's majority to minority transfer policy proposal as the principal vehicle for the voluntary transfers into the magnet programs, and to eliminate the need for the hardship transfer policy. Dr. Stolee proposed that any Anglo pupil in a school with higher than the district-wide average Anglo percentage can transfer to any school where either the minority percentage is higher than the district-wide average, or to any Anglo school which has a lower Anglo percentage than in the current school of attendance. Similarly, minority pupils in schools which are above the district-wide minority average can transfer to any school where the Anglo percentage is above the district average, or to any minority school having a lower percentage of minority pupils than the school of attendance.

The plaintiffs observe that although large scale changes in grade structure and building utilization have been discussed publicly, the District has never adopted any suitably detailed policies to assure that these changes will

promote and not impede integration. They assert that the promises of Resolution 2233 are insufficient. The plaintiffs request that this court make specific orders for detailed monitoring and reporting on the effects of the defendants' proposals. They also urge a clarification of the 1974 Decree to require expressly that the Board eliminate concentrations of minority teachers in schools historically identified as minority schools. The plaintiffs seek controls to assure that implementation of the Language Consent Decree does not impede the desegregation of students and teachers. Finally, the plaintiffs urge this court to state its views on the subject of permanent injunctive relief, and they suggest language to be included in such an order.

Resolution of the Immediate Dispute

The 1974 Decree imposed court control over student assignments, use of facilities, faculty and staff employment, and many other aspects of the operation of the Denver School System. That degree of court involvement was necessary to fulfill the Supreme Court's mandate to ensure that the School Board perform its "affirmative duty to desegregate the entire system 'root and branch.' " *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 213 (1972) (quoting *Green v. County School Board*, 391 U.S. 430, 438 (1967)). Essentially, the plaintiffs urge this court to continue such close supervision until the transition to a unitary school system is complete with adequate measures to prevent resegregation. The defendants view the court's continuing role as stifling and stigmatic. This court made specific findings on the District's failure to achieve unitary status and the reasons for continuing jurisdiction in the June 1985 Opinion. While the District responded positively to the October 1985 Order, the defendants have not proved that the objectives will be achieved.

The defendants recognize the uncertainty and, essentially, ask this court to rely on the Board of Education, the administrative staff, the faculty and the community to take the necessary action. The defendants' position is that Resolution 2233, discussed extensively in this court's June 1985 Opinion, is an adequate basis for assuring that race, color and ethnicity will not be impediments to obtaining the benefits offered by the Denver Public Schools.

This court cannot determine the effectiveness of the programs for increasing Anglo population at Barrett, Harrington and Mitchell Schools from the evidence at the March, 1986 hearing. The defendants have not demonstrated that the new transfer policy and faculty assignment plan will produce the required results. There is ample reason for the plaintiffs' continued skepticism about the concern, commitment and capacity to achieve and maintain a unitary School System in Denver. The only comprehensive plan developed by the Board of Education was the "Consensus Plan" which this court approved reluctantly in 1982. That plan was adopted only after rejection of the irresponsible Total Access Plan, and the Board's ability to arrive at its own consensus was undoubtedly affected by the need to close nine schools and establish the middle school program. While the magnet programs for Knight Fundamental Academy and the Gilpin Extended Day Care Center have been successful, the Consensus Plan had resegregative effects on Barrett, Harrington and Mitchell Schools.[1]

[1] The plaintiffs have called attention to this court's erroneous statement in the October 1985 Order that both Mitchell and Barrett remained racially identifiable throughout this litigation. As shown by the evidence at the 1984 and 1986 hearings, Barrett was integrated by the 1976 Decree and Mitchell nearly so. Both schools were segregated by the Consensus Plan as this court found in the 1985 Opinion, 609 F. Supp. 1491, 1507.

The resegregative effects could easily be remedied by additional adjustments in the student assignment plan as the plaintiffs have suggested. The District has chosen not to take that approach, reasoning that such changes have a destabilizing effect on the community resulting in reduced support for the public schools. This court accepts that assessment and encourages the effort to use alternative means. It is precisely because the Board has selected the more subtle methods for inducing change that this court must retain jurisdiction to be certain that those methods are effective.

Despite disagreement with this court's conclusion that the District has not achieved unitary status, the defendants have made a sincere and strenuous effort to meet the requirements of the October 1985 Order. Considering that effort, and accepting the declarations of Resolution 2233 as official District policy, this court now determines that it is time to relax the degree of court control over the Denver Public Schools, and to reduce the court's role in the operation of the District. The plaintiffs contend that there is institutional bad faith, and the history of the case casts a shadow of doubt over the Board's statement of intentions in Resolution 2233. This court has consistently recognized the importance of local autonomy in matters of educational policy and administrative judgment. The Board and administration must have sufficient freedom to make adaptations to enhance the effectiveness of the new programs and to accommodate changed circumstances. With that freedom goes the responsibility to meet the requirements of federal law. The degree of court control depends upon the extent of compliance with that duty.

This court rejects the request of the plaintiffs to impose the data collection, monitoring and reporting requirements set forth in the plaintiffs' post-hearing brief. It is

this court's expectation that the District will accomplish data collection and monitoring on its own. The Board and administration must be able to demonstrate the existence of equal educational opportunity for all students in the system.

The plaintiffs' suggestions for controls on the magnet program participation, adoption of the majority to minority transfer proposal, timing of teacher reassignments and inclusion of kindergarten and special education teachers in the teacher assignment policy are rejected at this time. The court accepts the defendants' contentions that there are adequate administrative and educational policy reasons for refusing these suggestions and that the objectives can be achieved without them. After a reasonable time, the District will be required to return to court to prove that it has performed its duty. If it fails, these and other suggestions will be considered.

The Future

A corollary to the decision to reduce court control over the District's activities is the conclusion that the process of constructing a final order of permanent injunction should go forward. The defendants have resisted this effort for the reasons urged in the motion to vacate the existing injunctive orders and to release the District from jurisdiction. Although that issue is on appeal, this court must proceed for several reasons.

First and foremost is the conviction that a final order of permanent injunction is the logical conclusion of this lawsuit because this court has the responsibility to define the duty owed to the plaintiffs by the defendants. Like any other litigation, that question must be decided in the context of an evidentiary record. That record reflects

changes which have occurred during the course of this lawsuit. Denver was a tri-ethnic community. It is now multi-racial. There have been adjustments in educational policy by the adoption of middle schools and magnet programs. Undoubtedly, new approaches to enhancing the quality of education will involve alterations of the structure of the Denver School System. It can be expected that these changes will generate controversy and the Board of Education will make difficult decisions. In the absence of some workable definition of a unitary school system, those decisions will generate new charges of discriminatory impact and disparate treatment.

A specific definition of a unitary school system for Denver, Colorado has evolved in this case. It was first proposed by the Ad-Hoc Committee established by the Board in 1980, and it was expressly adopted by this court in June, 1982, as follows:

> A unitary school system is one in which all of the students have equal access to the opportunity for education, with the publicly provided educational resources distributed equitably, and with the expectation that all students can acquire a community defined level of knowledge and skills consistent with their individual efforts and abilities. It provides a chance to develop fully each individual's potentials, without being restricted by an identification with any racial or ethnic groups.

Keyes v. School District No. 1, Denver, Colorado, 540 F. Supp. at 403-404. The court considers the guidelines developed by the Ad-Hoc Committee as useful criteria for determining the existence of a unitary system.

A final injunctive order is also necessary because of the proscription against student transportation to achieve racial balance contained in the Colorado Constitution, Art.

IX, § 8, adopted in 1974. The defendants assert that this provision is invalid because it conflicts with the United States Constitution. But this section is not facially invalid. One can conceive of a school district in which methods other than mandatory student assignments may avoid racial segregation, but that it is certainly not true in Denver, Colorado. Some amount of student transportation is required to operate and maintain a unitary school system in Denver because there are segregated residential neighborhoods. Without a federal court order, any student assignment plan involving mandatory assignment or transportation of students would be subject to new attack under the state law. The Colorado Constitution cannot be ignored by the Board, but its application may be enjoined by this court.

A permanent injunction is necessary for the protection of all those who may be adversely affected by Board action. The Tenth Circuit Court of Appeals has recently emphasized and repeated the admonition that "the purpose of court-ordered school integration is not only to achieve, but also to *maintain* a unitary school system." *Dowell v. Board of Education*, 795 F.2d 1516, 1520, *cert. denied*, 55 U.S.L.W. 3316 (1986). Resegregation can occur as much by benign neglect as by discriminatory intent. A beneficiary of a permanent injunction may come to court to enforce the rights obtained in this litigation by showing that the injunctive decree is not being obeyed. *Id.* at 1521. "To make the remedy meaningful, the injunctive order must survive beyond the procedural life of the litigation . . ." *Id.* at 1521. The District may "return to the court if it wants to alter the duties imposed upon it by a mandatory decree." *Id.* at 1520.

The defendant has resisted the development of a final permanent injunctive order because the Board believes

that it cannot bind future Boards. This court agrees. That is exactly why there must be a court order. Neither this Board, nor any future Board, can escape the history of this case.

Having rejected the plaintiffs' request for the data collection, monitoring and reporting requirements, this court will set a time for the defendant to make a further evidentiary showing of the effectiveness of its plans and operations in achieving a unitary school system. The court and counsel must proceed to determine the specific contents of a final order of permanent injunction. Additionally, immediate changes must be made in the existing orders. There is uncertainty about whether the plus or minus 15% ratio of the Finger Plan remains in effect. This court has *not* required that every school in the District maintain that ratio. The 1974 and 1976 Decrees emphasized numbers because that was the starting point. The specific pupil assignment plan adopted in the 1976 Decree is no longer operative. The monitoring commission has been removed. There are some conflicts between the 1974 Decree and the Language Consent Decree. The ZB-III training program is outdated. Paragraphs 16 through 20 of the 1974 Decree are no longer appropriate.

Accordingly, the court will meet with counsel to discuss immediate modifications of the existing orders, a time for the District to prove the effectiveness of its programs, and a final order of permanent injunction.

Upon the foregoing, it is

ORDERED, that the defendants may proceed with the implementation of the plans and policies discussed in this opinion, and it is

FURTHER ORDERED, that the plaintiffs' alternative proposals and requests for further relief are denied, and it is

FURTHER ORDERED, that counsel will meet with the court on *March 13, 1987 at 10:30 a.m.*, in the court's Conference Room, Second Floor, Post Office Building, 18th and Stout Streets, Denver, Colorado.

Dated: February 25, 1987

BY THE COURT:

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Richard P. Matsch, Judge

APPENDIX E

[OCTOBER 6, 1987]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-1499
WILFRED KEYES, et al.,

Plaintiffs,

v.

CONGRESS OF HISPANIC EDUCATORS, et al.,

Plaintiff-Intervenors,

v.

SCHOOL District NO. 1, Denver, Colorado, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

MATSCH, Judge.

In the Memorandum Opinion and Order entered June 3, 1985, *Keyes v. School District No. 1, Denver, Colo.*, 609 F. Supp. 1491 (D. Colo. 1985), this court determined that the remedial phase of this desegregation case had not been completed and, therefore, denied the defendants'

motion to declare the District unitary and terminate jurisdiction. After the parties' unsuccessful attempts to reach a settlement, an Order For Further Proceedings was entered on October 29, 1985, directing the District to submit plans for achieving unitary status. The defendants and plaintiffs submitted their respective proposals for further remedial action, resulting in the Memorandum Opinion and Order of February 25, 1987, 653 F. Supp. 1536 (D. Colo. 1987). That decision recognized the plaintiffs' and plaintiff-intervenors' (plaintiffs) skepticism about the concern, commitment and capacity of the defendants to achieve and maintain a unitary system in Denver, Colorado, given the history of this litigation. Nonetheless, this court refused to grant the further relief sought by the plaintiffs and accepted the defendants' approach in the matters of: (1) Barrett, Harrington and Mitchell elementary schools, (2) the "hardship" transfer policy, (3) faculty assignments, and (4) plans for implementation of Resolution 2233. Additionally, this court rejected the plaintiffs' proposed data collection, monitoring and reporting requirements, relying on the defendants to establish and implement sufficient data collection and monitoring to demonstrate the effectiveness of their proposals when called upon at an appropriate time.

This court also looked to the future and recognized the need for modification of the existing court orders to relax court control and give the defendants greater freedom to respond to changing circumstances and developing needs in the educational system. Accordingly, the parties were asked to submit proposals for an interim decree to replace existing orders. Those suggested modifications were received and a hearing was held on June 24, 1987. The proposals, the memoranda concerning them and the arguments of counsel at the hearing have been carefully considered.

The essential difference between the parties in approaching the task at hand is that the defendants have asked the court to establish standards which will provide guidance for the District in taking the necessary actions and which will also provide a measurement for compliance. Thus, the defendants suggest that changes in attendance zones, assignments to schools, and grade-level structure from the student assignment plan in effect for the 1986-87 school year not be made without prior court approval if the projected effect would be to cause a school's minority percentage to move five percentage points or more further away from the then-current district-wide average for the level (elementary, middle or high school) than in the year preceding the proposed change. Additionally, the defendants suggest that no new magnet school or magnet program be established unless enrollment is controlled so that the anglo and minority enrollments, respectively, are at least 40% of the total enrollment within a reasonable time. The defendants also suggest that prior court approval must be obtained for any enlargement of existing school facilities, construction of new schools, or the closing of any schools.

The plaintiffs contend that the defendants' request for specific judicial directives demonstrates their reluctance to accept responsibility to eradicate the effects of past segregation, and to assure that changes in policies, practices and programs will not serve to reestablish a dual school system. The defendants' reliance on the court creates doubt about their ability and willingness to meet the constitutional mandate of equal educational opportunity.

The injunctive decree must meet the requirements of Rule 65(d) of the Federal Rules of Civil Procedure and, yet, that requirement of specificity should not be permitted to stifle the creative energy of those who plan, supervise

and operate the District, or to supplant their authority to govern. The task, therefore, is to develop a decree which strikes a balance between rigidity and vagueness. The principal purpose is to enable the defendants to operate the school system under general remedial standards, rather than specific judicial directives. This interim decree removes obsolete provisions of existing orders, relinquishes reporting requirements, and eliminates the need for prior court approval before making changes in the District's policies, practices and programs. The defendants are expected to act on their own initiative, without prior court approval, to make those changes in the student assignment plan of attendance zones, pairings, magnet schools or programs, satellite zones and grade level structure which the Board determines to be necessary to meet the educational needs of the people of Denver.

The interim decree is a necessary step toward a final decree which will terminate jurisdiction. The legal principles involved continue to be those articulated by Chief Justice Burger for a unanimous Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The final decree will be formed under the guidance of *Dowell v. Board of Education of Oklahoma City*, 795 F.2d 1516 (10th Cir. 1986). The timing of a final order terminating the court's supervisory jurisdiction will be directly related to the defendants' performance under this interim decree. It will be the defendants' duty to demonstrate that students have not and will not be denied the opportunity to attend schools of like quality, facilities and staffs because of their race, color or ethnicity. When that has been done, the remedial stage of this case will be concluded and a final decree will be entered to give guidance for the future.

The defendants object to the use of the term "racially identifiable schools" as too indefinite and express apprehension that this may be construed to mean an affirmative duty broader than that required by the Equal Protection Clause of the Fourteenth Amendment to the Constitution. This concern is eliminated by the requirement that racial identifiability or substantial disproportion must not result from the defendants' actions. What is enjoined is governmental action which results in racially identifiable schools, as discussed in *Swann*. In the evolution of the law since *Brown v. Board of Education*, the Supreme Court has indicated in the opinions for the majority in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), and in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977), that some discriminatory intent must be shown to prove a violation of the constitutional requirement that educational opportunity must be equally available. That intent is not, however, measured by the good faith and well meaning of individual Board members or of the persons who carry out the policies and programs directed by the Board. The intent is an institutional intent which can be proved only by circumstantial evidence. What the District does in the operation of its schools will control over what the Board says in its resolutions. In the remedial stage of a school desegregation case, the court must be concerned with the affirmative duty to eradicate the effects of past intentional governmental discrimination. When unitary status is achieved, court supervision can be removed only when it is reasonably certain that future actions will be free from institutional discriminatory intent.

Upon the foregoing, it is now

ORDERED AND ADJUDGED:

1. The defendants, their agents, officers, employees and successors and all those in active concert and participation

with them, are permanently enjoined from discriminating on the basis of race, color or ethnicity in the operation of the school system. They shall continue to take action necessary to disestablish all school segregation, eliminate the effects of the former dual system and prevent resegregation.

2. The defendants are enjoined from operating schools or programs which are racially identifiable as a result of their actions. The Board is not required to maintain the current student assignment plan of attendance zones, pairings, magnet schools or programs, satellite zones and grade-level structure. Before making any changes, the Board must consider specific data showing the effect of such changes on the projected racial/ethnic composition of the student enrollment in any school affected by the proposed change. The Board must act to assure that such changes will not serve to reestablish a dual school system.

3. The constraints in paragraph 2 are applicable to future school construction and abandonment.

4. The duty imposed by the law and by this interim decree is the desegregation of schools and the maintenance of that condition. The defendants are directed to use their expertise and resources to comply with the constitutional requirement of equal educational opportunity for all who are entitled to the benefits of public education in Denver, Colorado.

5. The District retains the authority to initiate transfers for administrative reasons, including special education, bilingual education and programs to enhance voluntary integration. The defendants shall maintain an established policy to prevent the frustration, hindrance or avoidance of a District student assignment plan through parent initiated transfers and shall use administrative procedures to investigate, validate and authorize transfer requests using

criteria established by the Board. If transfers are sought on grounds of "hardship", race, color or ethnicity will not be a valid basis upon which to demonstrate "hardship". The defendants shall keep records of all transfers, the reasons therefor, the race, color or ethnicity of the student, and of the effects on the population of the transferee and transferor schools.

6. No student shall be segregated or discriminated against on account of race, color or ethnicity in any service, facility, activity, or program (including extracurricular activities) conducted or sponsored by the school in which he or she is enrolled. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school related services, facilities and activities, and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, shall be open to all persons without regard to race, color or ethnicity. The District shall provide its resources, services and facilities in an equitable, nondiscriminatory manner.

7. The defendants shall maintain programs and policies designed to identify and remedy the effects of past racial segregation.

8. The defendants shall provide the transportation services necessary to satisfy the requirements of this interim decree notwithstanding the provisions of Article IX, Section 8 of the Colorado Constitution.

9(A). The principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial or ethnic composition of a staff indicate that a school is intended for minority students or anglo students.

(B). Staff members who work directly with children, and professional staff who work on the administrative

level will be hired, assigned, promoted, paid, demoted, dismissed, and otherwise treated without regard to race, color or ethnicity.

(C). Defendants are required to use an effective affirmative action plan for the hiring of minority teachers, staff and administrators with the goal of attaining a proportion which is consistent with the available labor force; the plan shall contain yearly timetables and a reasonable target date for the attainment of the affirmative action goals.

10. The District will continue to implement the provisions of the program for limited English proficiency students heretofore approved by the Court in the Language Rights Consent Decree of August 17, 1984. Nothing in this interim decree shall modify or affect the Language Rights Consent Decree of August 17, 1984, and the prior orders entered in this case relating thereto shall remain in full force and effect.

11. It is further provided that this interim decree is binding upon the defendant Superintendent of Schools, the defendant School Board, its members, agents, servants, employees, present and future, and upon those persons in active concert or participation with them who receive actual notice of this interim decree by personal service or otherwise.

12. This interim decree, except as provided herein, shall supersede all prior injunctive orders and shall control these proceedings until the entry of a final permanent injunction.

Dated: October 6, 1987

BY THE COURT:

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Richard P. Matsch, Judge